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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACK ROBINETTE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the rebuttal provisions of a Department of Labor regulation satisfy Section 402(f)(2) of the Black Lung Benefits Act, which requires the Department to apply "[c]riteria * * * not more restrictive" than the criteria applied during an earlier phase of the black lung program.

2. Whether the statute, if construed to invalidate the Department's rebuttal provisions, violates the constitutional guarantee of due process.

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In the Supreme Court of the United States

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No.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACK ROBINETTE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is unpublished, but the decision is noted at 902 F.2d 1566 (Table). The decision and order of the Benefits Review Board (App., *infra*, 8a-12a), the Board's order on reconsideration (App., *infra*, 13a-15a), and the decision and order of the administrative law judge (ALJ) (App., *infra*, 16a-24a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution; Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f); the Department of Health, Education and Welfare's presumption regulation, 20 C.F.R. 410.490; and the Department of Labor's presumption regulation, 20 C.F.R. 727.203, are reprinted in the appendix to this brief. App., *infra*, 25a-32a.

STATEMENT

1. The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, provides benefits to former coal miners and their survivors for total disability or death due to pneumoconiosis. Disability claims filed by June 30, 1973, were considered by the Department of Health, Education, and Welfare (HEW) under regulations that included a presumption of entitlement to benefits (20 C.F.R. 410.490) that was available to certain claimants. Claims filed after that date are considered by the Department of Labor. Claims filed with the Department of Labor before April 1, 1980, are subject to Section 402(f)(2) of the statute, 30 U.S.C. 902(f)(2), which provides that the "[c]riteria" applied to those claims "shall not be more restrictive than the criteria applicable to a claim" adjudicated by HEW. See *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414, 417-419 (1988).

In response to Section 402(f)(2), Labor promulgated its own presumption regulation, 20 C.F.R. 727.203. While there were only two ways to invoke

HEW's presumption (see 20 C.F.R. 410.490(b)(1)), there are five ways to invoke Labor's presumption. See 20 C.F.R. 727.203(a)(1)-(5). Once the presumption had been invoked, HEW's regulation specified that the presumption could be rebutted (1) by proving that the miner was doing his usual coal mine work or comparable work or (2) by proving that the miner was capable of doing such work. 20 C.F.R. 410.490(c)(1) and (2). In contrast, Labor's regulation specifies four rebuttal methods. The first two generally correspond to the two specified HEW methods. 20 C.F.R. 727.203(b)(1) and (2). The third and fourth Labor methods allow a party contesting entitlement to defeat a claim either (3) by proving that the disability or death of the miner did not arise in whole or in part from coal mine employment or (4) by proving that the miner does not or did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).

2. In 1973, Jack Robinette applied to HEW for black lung benefits. After HEW denied his claim, he elected and received review of the claim in light of the 1978 amendments to the Black Lung Benefits Act.[1] HEW again denied his claim, but referred it to the Department of Labor for further review. App., *infra*, 2a. This claim, which is properly treated as if it had been filed with the Department of Labor, 30 U.S.C. 945(a)(3)(A), is subject to the prohibition in Section 402(f)(2) against the application of criteria that are more restrictive than those that HEW applied.

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[1] The procedures by which claimants could elect review of claims that had been denied before the effective date of the 1978 amendments are set forth in 30 U.S.C. 945.

The Department of Labor denied benefits. The ALJ found it undisputed that the claimant had presented x-ray evidence showing pneumoconiosis arising from his work as a miner, and therefore concluded that he had invoked the presumption of eligibility. App., *infra*, 17a-19a. The ALJ also found, however, that the medical evidence established that the claimant's pneumoconiosis was not totally disabling. *Id.* at 21a. In the ALJ's view, that evidence satisfied Labor's second rebuttal method (proof that the claimant was able to do his usual coal mine work) but not its third method (proof that the miner's disability did not arise in whole or in part from his work as a miner). *Id.* at 21a-23a.

The Benefits Review Board held that the ALJ had erred in finding rebuttal under Labor's second method. App., *infra*, 10a. Under controlling court of appeals decisions issued after the ALJ's decision, the second rebuttal method is unavailable where the miner's pulmonary or respiratory condition is not disabling, but the miner has a non-respiratory disability. *Ibid.* The Board nevertheless found the evidence sufficient to rebut the presumption under Labor's third method, and concluded that the ALJ's error in relying on the second rather than the third method was "harmless." *Id.* at 11a.

3. The court of appeals reversed the denial of benefits. App., *infra*, 1a-7a. Relying on its previous decisions in *Taylor* v. *Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), petition for cert. pending, No. 90-113 (filed July 17, 1990), and *Dayton* v. *Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990), petition for cert. pending, No. 90-114 (filed July 17, 1990), the court held that Labor's third and fourth rebuttal methods violated Section 402(f)(2)'s prohibition against the use of more restrictive criteria.

App., *infra*, 6a. In the court's view, rebuttal may be accomplished only by proof that a miner was working or was able to work (Labor's first and second methods) and not by proof that a miner's disability did not arise in whole or in part from coal mining (Labor's third method) or by proof that the miner did not have pneumoconiosis (Labor's fourth method). *Ibid.* Because the evidence did not show that the claimant was working or was able to work, the court concluded that rebuttal was unavailable under HEW's regulation and that benefits should be awarded. *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

The questions presented in this case are identical to the questions presented in *Pauley* v. *Bethenergy Mines, Inc.*, No. 89-1714, *Clinchfield Coal Co.* v. *Director*, No. 90-113, and *Consolidation Coal Co.* v. *Director*, No. 90-114, which also involve the validity of the rebuttal provisions in the Department of Labor's presumption regulation. As discussed in more detail in our brief in *Pauley*,[2] review of the questions presented is warranted because the courts of appeals are divided on the validity of the rebuttal provisions. The Third and Sixth Circuits have upheld the provisions. See *Bethenergy Mines, Inc.* v. *Director, OWCP*, 890 F.2d 1295 (3d Cir. 1989), petition for cert. pending *sub nom. Pauley* v. *Bethenergy Mines Inc.*, No. 89-1714 (filed May 7, 1990); *Youghiogheny & Ohio Coal Co.* v. *Milliken*, 866 F.2d 195 (6th Cir. 1989). The court below and the Seventh Circuit have invalidated parts of the regulation.

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[2] We are serving a copy of our brief in *Pauley* on counsel for respondent, the only other party in this case.

See App., *infra*, 6a; *Taylor* v. *Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), petition for cert. pending, No. 89-1696 (filed May 2, 1990). Accord *Taylor* v. *Clinchfield Coal Co.*, 895 F.2d at 182-183; *Dayton* v. *Consolidation Coal Co.*, *supra*. The courts of appeals have acknowledged the conflict. See *Peabody Coal*, 892 F.2d at 506; *Pauley*, 890 F.2d at 1302-1303. Indeed, the court below stated: "We recognize this conflict among the circuits and hope either that Congress will act to clarify these confusing regulations or that the Supreme Court will definitively resolve this conflict." App., *infra*, 6a n.8.

The conflict can be expected to have a significant, detrimental impact on the administration of the black lung program because an estimated 2,000 to 3,500 claims governed by Section 402(f)(2), each valued at between $118,315 and $185,656, are still in litigation, and we believe that a high percentage of them are affected by the conflict. See Fed. Resp. Br. at 8-9 in *Pauley* v. *Bethenergy Mines, Inc.*, No. 89-1714. However, we do not think that this is an appropriate vehicle for plenary review, and we recommend instead that the Court hold this petition and then dispose of it in light of its disposition of the other pending cases. That course is preferable because no coal mine operator is involved in this case. Since the coal companies will be required to pay benefits in many additional cases if Labor's third and fourth rebuttal methods are held to be invalid, we believe that the validity of those methods ought to be resolved in a case in which a coal company is a party. In addition, the unpublished, per curiam decision in this case does not analyze the questions presented in a way that would assist the Court in resolving them.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of the petition in No. 89-1714, *Pauley* v. *Bethenergy Mines Corp.*, or No. 90-114, *Consolidation Coal Co.* v. *Dayton*.[3]

Respectfully submitted.

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JULY 1990

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[3] In our responses to the certiorari petitions in these two cases, we set forth more fully our reasons for believing that, of the cases in which certiorari petitions have been filed, they are the strongest candidates for plenary consideration.

See App., *infra*, 6a; *Taylor* v. *Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), petition for cert. pending, No. 89-1696 (filed May 2, 1990). Accord *Taylor* v. *Clinchfield Coal Co.*, 895 F.2d at 182-183; *Dayton* v. *Consolidation Coal Co.*, *supra*. The courts of appeals have acknowledged the conflict. See *Peabody Coal*, 892 F.2d at 506; *Pauley*, 890 F.2d at 1302-1303. Indeed, the court below stated: "We recognize this conflict among the circuits and hope either that Congress will act to clarify these confusing regulations or that the Supreme Court will definitively resolve this conflict." App., *infra*, 6a n.8.

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JULY 1990

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-1144

JACK ROBINETTE, PETITIONER

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

On Petition for Review of an Order of the Benefits Review Board

(No. 86-215-BLA)

Argued: January 8, 1990 Decided: April 27, 1990

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and MOTZ, United States District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

In this case, Jack Robinette seeks review of the decision of the Benefits Review Board ("BRB" or "Board") affirming the denial of benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* Specifically, Robinette contends that the Board erred

in finding that the Director, Office of Workers' Compensation Programs [1] ("Director") had rebutted the presumption of total [dis]ability by proving that the disability did not arise out of his coal mining employment. He also claims that the Board erred in not remanding the case back to the Administrative Law Judge for reconsideration under the less restrictive criteria of 20 C.F.R. § 410.490. In light of this court's decision in *Taylor v. Clinchfield Coal Co.*, —— F.2d ——, No. 87-3852 (4th Cir. 1990), we reverse and remand the Board's decision with instructions to award benefits under the interim Health, Education and Welfare regulations found in 20 C.F.R. Part 410.

I.

On March 23, 1973, Jack Robinette filed an application with the Social Security Administration for disability income benefits under Part B of the Black Lung Benefits Act. In 1978, he filed an election to have his claim reviewed by the Social Security Administration ("SSA"). After the claim was denied by the SSA, it was reviewed by the Department of Labor under Part C of the Black Lung Benefits Reform Act. The Department also administratively denied the claim, and Robinette requested a formal hearing.

A hearing was held before Administrative Law Judge James J. Butler ("ALJ") on July 10, 1985. At that hearing, the Director stipulated that Robinette had worked 30 years in coal mine employment,

[1] The Deputy Commissioner in the Office of Workers' Compensation Programs dismissed the coal mine operator and transferred potential liability to the Black Lung Disability Trust Fund pursuant to the 1981 Amendments to the Black Lung Benefits Act.

had pneumoconiosis, and that pneumoconiosis was a causal factor in his disability. The only issue contested by the Director was whether Robinette was totally disabled as defined by the Act. On December 24, 1985, the ALJ issued an order denying benefits. The order stated that Robinette was entitled to the interim presumption pursuant to 20 C.F.R. § 727.203 (a)(1) that he was totally disabled because of pneumoconiosis arising out of his coal mine employment. However, the ALJ also concluded that this presumption had been rebutted pursuant to 20 C.F.R. § 727.203(b)(2) ("(b)(2) rebuttal") because the preponderance of the evidence established that Robinette was not totally disabled because of pneumoconiosis. Robinette appealed the decision to the Board.

In its decision, the BRB reversed the ALJ's finding that the (b)(2) rebuttal was established, but it also reversed, *sua sponte*, the ALJ's conclusion that the 20 C.F.R. § 727.203(b)(3) rebuttal ("(b)(3) rebuttal") was not established.[2] It found that the ALJ's rebuttal findings under subsection (b)(2) were affirmable under subsection (b)(3) because of the intervening pronouncement in *Sykes v. Director, OWCP*, 812 F.2d 890 (4th Cir. 1987).[3] Holding that

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[2] Rebuttal under (b)(3) is recognized when the evidence establishes that the miner's disability did not arise out of the coal mining employment.

[3] In *Sykes*, this court stated:

> Section 727.203(b)(2) is concerned with the question of whether miners are totally disabled *for whatever reason*. There is no inquiry into causation in a proper § 727.203 (b)(2) rebuttal. . . . Causation is addressed in § 727.203 (b)(3). Once the miner's disability is conceded, *then*

the presumption had been rebutted under (b)(3), the Board denied any benefits to Robinette under 20 C.F.R. Part 727, but remanded the case to the ALJ for consideration of entitlement under 20 C.F.R. § 410.490.

The Director filed a Motion for Reconsideration of the remand, and on June 23, 1988, the Board issued an Order on Reconsideration affirming the ALJ's denial of benefits. In its decision, the Board held that section 410.490 was inapplicable to Robinette's claim because, as applied, the section violated the Administrative Procedure Act.[4] It, therefore, granted the Director's Motion for Reconsideration and affirmed the ALJ's denial of benefits.

Robinette then appealed these decisions to this Court.

II.

The Black Lung Benefits Act provides benefits to former coal mine employees who are totally disabled

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> the question arises whether the disability is unrelated to mine work.

Sykes, 812 F.2d at 894. Before our opinion in *Sykes*, the BRB had taken the position that an employer may rebut the interim presumption under section [727.]203(b)(2) by showing that a miner, while concededly totally disabled, is not disabled for pulmonary or respiratory reasons. This apparently had also been the position of the Director's counsel and the ALJ in the present case.

[4] The BRB relied on its own decision in *Whiteman v. Boyle Land and Fuel Coal Co.*, BRB No. 87-348 (May 2, 1988), for this position. The Supreme Court's decision in *Pittston Coal Group v. Sebben*, 488 U.S. ——, 109 S. Ct. 414, 102 L. Ed. 2d 408 (1988), however, effectively overruled *Whiteman*. All parties now acknowledge that the BRB was incorrect in its reasoning on this issue, and the arguments presented in this appeal do not rely on that reasoning.

because of pneumoconiosis. Black lung benefit claims filed before July 1, 1973 were evaluated according to "interim" regulations promulgated by the former Department of Health, Education and Welfare (HEW). *See* 20 C.F.R. § 410.490. These regulations were part of Part B of the Black Lung Benefits Act to be administered by HEW. The regulations established a rebuttable presumption that a miner is totally disabled because of pneumoconiosis if certain criteria were met. *See* 20 C.F.R. § 410.490(b). The regulations also provided that the presumption of total disability could be rebutted by evidence that the miner was doing his usual coal mine work or comparable and gainful work or was able to do such work.[5] 20 C.F.R. § 410.490(c).

In 1978, Congress amended the Black Lung Benefits Act and directed the Secretary of Labor to establish permanent regulations to be applied to claimants under Part C of the Act. It also instructed the Secretary to reopen claims that had been denied prior to the effective date of the 1978 amendments. 30 U.S.C. § 945. In adjudicating these reopened claims, the criteria applied by the Department of Labor ("DOL") were to be "not more restrictive than criteria applicable to a claim filed on June 30, 1973." 30 U.S.C. § 902(f)(2). In response to this mandate, the Secretary promulgated the regulations found in 20 C.F.R. Part 727.[6] Under section 727.203, a presumption of total disability, similar to that provided for in 20 C.F.R. § 410.490, may be rebutted in any of four ways pursuant to section 727.203(b): (b)

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[5] These rebuttals are the equivalent of those found in 20 C.F.R. § 727.203(b)(1) and (b)(2).

[6] The regulations apply to claims filed after July 1, 1973, but before April 1, 1980.

(1) if the miner is still "doing his usual coal mine work or comparable and gainful work;" (b)(2) if the miner "is able to do his usual coal mine work or comparable and gainful work;" (b)(3) if the total disability of the miner "did not arise in whole or in part out of coal mine employment; or (b)(4) if the miner "does not, or did not, have pneumoconiosis." 20 C.F.R. § 727.203(b).

In *Taylor v. Clinchfield Coal Co.*, —— F.2d ——, No. 87-3852 (4th Cir. 1990), this court held that the additional means of rebuttal found under section 727.203(b), but not found in section 410.490(c), violate 30 U.S.C. § 902(f)(2).[7] *See also Dayton v. Consolidation Coal Co.*, —— F.2d ——, No. 89-3203 (4th Cir. 1990). Therefore, Robinette is entitled to have his claim evaluated under the more lenient rebuttal provisions of 20 C.F.R. Part 410.[8]

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[7] This issue had been left open in *Pittston Coal Group v. Sebben*, 488 U.S. ——, 109 S. Ct. 414, 102 L. Ed. 2d 408 (1988). In *Sebben*, the Supreme Court affirmed this court's holding in *Broyles v. Director, OWCP*, 824 F.2d 327 (4th Cir. 1987), that the invocation provisions of the DOL interim presumption at § 727.203(a) violated 30 U.S.C. § 902(f)(2) by being more restrictive than the HEW invocation provisions. The Court, however, expressly declined to consider the validity of the rebuttal provisions of the DOL interim regulations at § 727.203(b). *Sebben*, 488 U.S. at ——, 109 S. Ct. at 424, 102 L. Ed. 2d at 424.

[8] This result is also consistent with the case law of the Seventh Circuit under *Taylor v. Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), but contravenes *Bethenergy Mines, Inc. v. Director, OWCP*, 890 F.2d 1295 (3d Cir. 1989), and *Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989). We recognize this conflict among the circuits and hope either that Congress will act to clarify these confusing regulations or that the Supreme Court will definitively resolve this conflict.

As noted above, 20 C.F.R. § 410.490(c) provides for rebuttal of the presumption of total disability only by evidence that the claimant is, in fact, doing or is able to do his usual coal mine work or comparable and gainful work. In reversing the ALJ's finding that rebuttal was established under 20 C.F.R. § 727.203(b)(2), the BRB acknowledged that Robinette was totally disabled and unable to continue his coal mining or comparable employment. Therefore, pursuant to this court's decision in *Taylor*, the Director has no other available means to rebut Robinette's presumption of disability.[9] Consequently, we find no reason to remand this case for any further consideration of the evidence.

Accordingly, the decision of the Board is reversed and we remand Robinette's claim to the Board with instructions to award benefits pursuant to 20 C.F.R. § 410.490.

REVERSED AND REMANDED WITH INSTRUCTIONS

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[9] Despite dicta in other cases that might support arguments to the contrary, the presumption invocation provision of section 410.490(b)(2), through its cross-reference to section 410.416, does not provide for rebuttal equivalent to that provided for in section 727.203(b)(3). Section 410.416 addresses the cause of the miner's *disease*, not the cause of his disability. As explained by the Supreme Court:

> [P]aragraph [410.490](b)(2) . . . provides (by cross references to §§ 410.416 and 410.456) that a presumption of disease causation is established by ten years of coal mine employment. (To be sure, §§ 410.416 and 410.456 permit rebuttal of the presumption [of disease causation], but *it is plainly not the intended purpose of paragraph (b)(2) to serve as a rebuttal provision rather than a substantive requirement.*)

Sebben, 488 U.S. at ——, 102 L. Ed. 2d at 424 (emphasis added). Therefore, the only way to rebut the presumption under § 410.490 is by evidence with respect to total disability.

APPENDIX B

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

U.S. DEPARTMENT OF LABOR

BRB No. 86-215 BLA
OWCP No. 232-14-8295

JACK ROBINETTE, CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

DECISION and ORDER

[Filed Sep. 22, 1982]

Appeal of the Decision and Order of James J. Butler, Administrative Law Judge, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and MAHONY, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (83-BLA-4939) of Administrative Law Judge James J. Butler denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge found the interim presumption invoked pursuant to 20 C.F.R. § 727.203(a)(1), but found the presumption rebutted pursuant to subsection (b)(2). The administrative law judge also found the evidence insufficient to rebut the presumption under 20 C.F.R. § 727.203(b)(1), (3), (4). On appeal, claimant contends that the administrative law judge erred by finding the evidence of record sufficient to rebut the presumption.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. § 921(b)(5) (West 1986).

Court of Appeals for the Fourth Circuit held in *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95, 2-98 (4th Cir. 1987), that to establish rebuttal pursuant to subsection (b)(2), the opposing party must show that the miner is not disabled "for whatever reason." A showing that the miner is not disabled for pulmonary or respiratory reasons is not sufficient to establish rebuttal under subsection (b)(2) where the record contains evidence of non-respiratory disability. The issue of causation therefore, is only relevant to subsection (b)(3). *See Sykes, supra*; *Borgeson v. Kaiser Steel Corp.*, 7 BLR 1-665 (1985). We hold that the administrative law judge's rebuttal findings under subsection (b)(2) in this claim are affirmable under subsection (b)(3), thereby rendering harmless the administrative law judge's failure to find the evidence sufficient under subsection (b)(3). *See Sykes, supra*; *Hamric v. Director, OWCP*, 6 BLR 1-1091, 1-1092 (1984). The administrative law judge acted within his discretion in crediting Dr. Nestman's assessment that claimant's pneumoconiosis is not disabling, over Dr. Thavaradhara's report as more thorough and well reasoned. *See Itell v. Ritchey Trucking Co.*, 8 BLR 1-356, 1-359 (1985); *Lipka v. Director, OWCP*, 8 BLR 1-360, 1-361 (1985); *Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985). Further, although the administrative law judge acted within his discretion by discrediting Dr. Thavaradhara's reports as inconsistent on their diagnoses of pneumoconiosis, the administrative law judge correctly noted that Dr. Thavaradhara's disability assessment, attributing claimant's disability to heart disease, corroborates Dr. Nestman's report. *See Itell, supra.*

Furthermore, the administrative law judge's failure to consider the only remaining disability assessments of record prepared by Drs. Fortner and Tan, which attribute claimant's disability to non-respiratory causes, also constitutes harmless error as these assessments support rebuttal under subsection (b)(3).[1] *See Sykes, supra*; *Borgeson, supra.* Moreover, inasmuch as the pulmonary function and blood gas studies of record all contain non-qualifying results, the administrative law judge properly determined that they supported a finding of rebuttal under Section 727.203(b). *See Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986) (*en banc*); Decision and Order at 4. We therefore affirm the administrative law judge's rebuttal findings under subsection (b)(3). *See Sykes, supra*; *Stapleton, supra.*

In addition, subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit held in *Broyles v. Director, OWCP*, —— F.2d ——, No. 86-1091 (4th Cir. July 31, (1987) that where entitlement is precluded under Part 727, the criteria under Section 410.490 are applicable. Based

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[1] Contrary to the administrative law judge's statement that the report of Dr. Fortner only addresses heart disease, Dr. Fortner's report diagnoses "chronic obstructive pulmonary disease" and concludes that claimant's total disability is due to his heart disease. *See* Director's Exhibits 19, 52; Decision and Order at 4. Similarly, Dr. Tan's report, which the administrative law judge did not consider because he found that she did not make any disability assessments, noted that claimant could not carry or lift due to "open heart surgery" in her medical assessment. *See* Director's Exhibits 12, 20; Decision and Order at 4; *Aleshire v. Central Coal Co.*, 8 BLR 1-70 (1985); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984).

on the administrative law judge's findings that claimant has established thirty years of coal mine employment and x-ray evidence determinative of pneumoconiosis, *see* Decision and Order at 2, 3, invocation of Section 410.490 is established. *See* 20 C.F.R. § 410.490(b)(1)(i), (2). We must remand this case, however, to allow the administrative law judge to weigh all relevant evidence of record, including the reports of Drs. Fortner and Tan, to determine whether the Director, Office of Workers' Compensation Programs, has met the rebuttal burden thereunder of establishing that claimant can perform his usual coal mine employment. *See* 20 C.F.R. § 410.490 (c).

Accordingly, the Decision and Order of the administrative law judge is affirmed in part, vacated in part and remanded for further consideration in accordance with this opinion.

SO ORDERED.

/s/ Robert L. Ramsey
ROBERT L. RAMSEY, Chief
Administrative Appeals
Judge

/s/ Roy B. Smith
ROY B. SMITH
Administrative Appeals
Judge

/s/ Robert G. Mahony
ROBERT G. MAHONY
Administrative Law Judge

Dated this 22nd
day of September 1987

APPENDIX C

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

U.S. DEPARTMENT OF LABOR

BRB No. 86-215 BLA
OWCP No. 232-14-8295

JACK ROBINETTE, CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

ORDER on RECONSIDERATION

[Filed Jun. 23, 1988]

By motion received October 23, 1987, the Director, Office of Workers' Compensation Programs (the Director) requested that the Board reconsider its Decision and Order affirming in part, vacating in part and remanding the Decision and Order (83-BLA-4939) of Administrative Law Judge James J. Butler denying benefits. In its Decision and Order dated September 22, 1987, the Board affirmed the administrative law judge's finding that the evidence was sufficient to rebut the interim presumption pursuant to 20 C.F.R. § 727.203(b)(3). The Board, however,

remanded the case to the administrative law judge to consider entitlement under 20 C.F.R. § 410.490 pursuant to *Broyles v. Director, OWCP*, 824 F.2d 327, 10 BLR 2-194 (4th Cir. 1987). The Director now moves for reconsideration, contending that the Board erred by applying the regulation at 20 C.F.R. § 410.490 to this claim.

Subsequent to the issuance of the Board's Decision and Order herein, the Board held in *Whiteman v. Boyle Land and Fuel Coal Co.*, —— BLR ——, BRB No. 87-348 BLA (May 2, 1988), that the regulation at 20 C.F.R. § 410.490 is invalid under the Administrative Procedure Act as it is applied to claims arising under Part C of the Act. *See* 5 U.S.C. § 533(b), (c), as incorporated into the Act by 5 U.S.C. § 554(d), 33 U.S.C. § 919(d) and 30 U.S.C. § 932(a). As claimant elected on February 10, 1978 to have his claim reviewed by the Department of Labor under the regulations at 20 C.F.R. Part 727 and Section 410.490 is therefore inapplicable to this claim, we will grant the Director's Motion for Reconsideration and affirm the administrative law judge's Decision and Order denying benefits. *Whiteman, supra*. Since we are granting the Director's Motion for Reconsideration on the foregoing basis, we need not consider the Director's alternate argument.

Accordingly, the Decision and Order of September 22, 1987 remanding this case for reconsideration under 20 C.F.R. § 410.490 is hereby modified, and the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

/s/ Robert L. Ramsey
ROBERT L. RAMSEY, Chief
Administrative Appeals
Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals
Judge

/s/ Eric Feirtag
ERIC FEIRTAG
Administrative Law Judge

Dated this 23rd day
of June 1988

APPENDIX D

Office of Administrative Law Judges
211 Main Street
San Francisco, California 94105

U.S. DEPARTMENT OF LABOR

CASE NO. 83-BLA-4939
OWCP NO. 232-14-8295

IN THE MATTER OF JACK ROBINETTE, CLAIMANT

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

[Date Issued: 24 Dec. 1985]

Sunya Anderson, Esq., For the Claimant

Mark R. Malecki, Esq., For the Director

BEFORE: JAMES J. BUTLER, Administrative Law Judge

DECISION AND ORDER—DENYING BENEFITS

This is a claim for benefits filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972 and the Black Lung Benefits Reform Act of 1977, 30 U.S.C. § 901 *et seq.*, (hereinafter the "Act"). In accordance with the Act and the related regulations, contained in Title 20,

Code of Federal Regulations,[1] a formal hearing was held in Charleston, West Virginia on July 10, 1985. At this hearing the record was left open so that the medical report of Dr. Pathom Thavaradhara could be submitted post-hearing. This report has been submitted and it is admitted as Director's Exhibit 52. The record is now closed.

Issue

The only issue presented for decision is whether the claimant is totally disabled.

General Background

The claimant, Jack Robinette, was born on June 13, 1928. (DX-1). He began working in coal mine employment in 1945 (T-24) and he retired from coal mine employment in 1979. (T-10). During this time he was employed as a continuous miner operator and as a timberman. (T-10). He was constantly exposed to coal dust. (T-10).

The claimant is married to Betty Robinette. (DX-1). At the time this claim was filed, he had one dependent child, Gregory J. Robinette, born February 26, 1959 (DX-1). This claim was filed on March 26, 1973. (DX-1). Claimant elected to have his claim reviewed under the Part 727 regulations on February 10, 1978. (DX-34).

The Interim Presumption

The Act provides benefits to persons who are totally disabled due to pneumoconiosis. Pneumoconi-

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[1] Cited provisions herein refer to sections of that Title. Also, the following abbreviations are used: Director's and Claimant's Exhibits—DX and CX, respectively; Transcript of the Hearing—T.

osis is defined by the Act and the regulations to mean a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. Section 727.203 (a) of the regulations establishes a rebuttable ("interim") presumption, where the miner has engaged in coal mine employment for at least ten years, that the miner is totally disabled due to pneumoconiosis arising from his coal mine employment if he meets any one of the criteria set forth in subsections (a)(1) through (a)(4) of that section. Since claimant worked as a miner for thirty years, he will be eligible for the presumption if he meets the appropriate criteria. (T-4).

The presumption is raised where x-ray evidence establishes the existence of pneumoconiosis. See § 727.203(a)(1) and § 410.428. The following x-ray interpretations have been submitted into evidence:

Date	Exhibit	Rereading	Physician	Conclusion
6/20/80	DX-44		Tanguilg	Positive
4/27/81	DX-39		Craft	Positive
2/25/79	DX-32	10/19/79	Dessen	Positive
3/30/80	DX-31		Al-Asbahi	Positive
3/7/80	DX-30		Subramaniam	Positive
3/5/80	DX-29		Subramaniam	Positive
3/4/79	DX-28		Subramaniam	Positive
10/29/79	DX-27		Al-Asbahi	Positive
2/25/79	DX-26		Subramaniam	Positive
10/18/78	DX-25		Subramaniam	Positive
8/10/73	DX-24		Pelaez	Positive
4/26/73	DX-23		Pelaez	Positive
9/5/69	DX-22		Godwin	Positive
4/26/73	DX-21		Furnary	Unreadable
9/21/79	DX-18		Khan	Positive
5/29/85	DX-52		Al-Asbahi	Positive

With the exception of one reading by Dr. Furnary, all of the x-ray readings are positive for pneumoconiosis. The evidence presented, therefore, is clearly

sufficient to raise the presumption pursuant to § 727.203(a)(1).

Ventilatory Studies

The presumption will also be raised if ventilatory studies establish the existence of a chronic respiratory or pulmonary disease [§ 727.203(a)(2)]. In order to be considered, these studies must be both "qualifying" and "conforming." A qualifying study is a study which produces forced expiratory volume in one second (FEV_1) and maximum voluntary ventilation (MVV) values which are equal to or less than the values set out in 20 C.F.R. § 727.203(a)(2). In order to be considered conforming, the study must meet the quality standards set out in 20 C.F.R. § 410.430.

There were three ventilatory studies performed and submitted. The results of these studies were reported as follows:

Date	Exhibit	Physician	Height	FEV_1	MVV
2/19/80	DX-12	Tan	67"	2.31	112
6/20/80	DX-44	Nestmann	67"	3.08	133
5/29/85	DX-52	Thavaradhara	67"	2.35	90.56

None of these studies produced qualifying results. The evidence submitted, therefore, is clearly insufficient to raise the presumption pursuant to § 727.203(a)(2).

Blood Gas Studies

The presumption may also be raised by blood gas studies which demonstrate an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values equal to or below those set out in the chart in 20 C.F.R. § 727.203(a)(3). There are three blood gas studies submitted which had non-

qualifying results. These studies, therefore, are clearly insufficient to raise the presumption pursuant to § 727.203(a)(3). The results of the studies were reported as follows:

Date	Exhibit	Physician	PCO_2	PO_2
2/19/80	DX-13	Tan	32	137
6/20/80	DX-44	Nestmann	37	90
5/29/85	DX-52	Thavaradhara	38	87

Other Medical Evidence

The presumption may also be raised under 20 C.F.R. § 727.203(a)(4) on the basis of other medical evidence including the documented opinion of a physician, exercising reasoned medical judgment, which demonstrates the existence of a totally disabling respiratory or pulmonary impairment. In this case, no other evidence has been submitted which would be sufficient [to] raise the presumption. None of the physicians who examined the claimant found him to be totally disabled.

Conclusion

Since the claimant has submitted sufficient evidence to satisfy § 727.203(a)(1), the presumption is raised in his favor.

Rebuttal of the Interim Presumption

The presumption of total disability established under § 727.203(a) may be rebutted pursuant to § 727.203(b) if the evidence submitted is sufficient to satisfy the criteria established by § 727.203(b).

The first factor to be considered is whether the evidence establishes that the claimant is, in fact, doing his usual coal mine work or comparable and gainful work [§ 727.203(b)(1)]. Since the record

clearly shows that the claimant stopped working in 1979 and that he has not returned to work since that time, the evidence introduced is insufficient to rebut the presumption pursuant to § 727.203(b)(1). (T-10).

The second factor which must be considered is whether the evidence establishes that the claimant is able to do his usual coal mine work or comparable and gainful work [§ 727.203(b)(2)].

In the case at hand, the evidence submitted is clearly sufficient to rebut the presumption. As previously noted, all of the ventilatory studies and blood gas studies were non-qualifying. Also, the only two physicians who rendered an opinion on the issue of disability found that the claimant was not totally disabled. The claimant was examined by five physicians. Dr. Fortner and Dr. Stratford G. Warren examined the claimant in connection with his heart disease and coronary bypass surgery. (DX-18, 19). Neither of these physicians rendered an opinion as to whether the claimant was disabled due to a respiratory or pulmonary impairment.

Similarly, Dr. Tan examined the claimant on February 19, 1980 and diagnosed the existence of pneumoconiosis; however, she did not make any findings concerning disability. (DX-20).

The only physicians who specifically assessed the extent of the claimant's disability were Dr. Ralph H. Nestmann (DX-44) and Dr. Patham Thavaradhara. (DX-52). Dr. Nestmann examined the claimant on June 20, 1980. After performing a non-qualifying ventilatory study and a non-qualifying blood gas study and an x-ray which he found showed only minimal pneumoconiosis and a physical examination, Dr. Nestmann concluded that the claimant did have pneumoconiosis, but that this pneumoconiosis would

not prevent the miner from performing his usual coal mine work. Dr. Nestman's opinion was based upon all of the evidence he examined and not primarily or principally upon non-qualifying ventilatory or blood gas tests.

Dr. Pathom Thavaradhara examined the claimant on May 29, 1985 and on September 14, 1983. (DX-52). In an initial opinion dated September 14, 1983, Dr. Thavaradhara found that the claimant did have pneumoconiosis on the basis of a chest x-ray. He stated, however, that the claimant's ventilatory testing was normal.

In an opinion dated June 18, 1985 and an addendum dated August 12, 1985, Dr. Thavaradhara concluded that the claimant was not disabled due to lung disease. At this time he stated that the claimant did not have pneumoconiosis and that any disability he might have would be related to heart disease. (DX-52). Dr. Thavaradhara based his opinion on an x-ray reading, a ventilatory study, a blood gas study and a physical examination. His opinion is clearly inconsistent concerning the existence of pneumoconiosis. Due to the inconsistency in his opinion, it will not be accorded great weight. It does tend, however, to corroborate Dr. Nestmann's findings.

On the whole, the evidence submitted is sufficient to rebut the presumption pursuant to § 727.203 (b)(2). *See Blankenship v. Beatrice Pocahontas Coal Company*, 678 F.2d 506 (4th Cir. 1982).

The third factor which must be considered is whether the evidence establishes that the claimant's disability did not arise out of coal mine employment. § 727.203(b)(3). The only physician who attributed the claimant's symptoms to heart disease was Dr. Thavaradhara (DX-52). Dr. Thavaradhara's findings, however, were far from conclusive. In the ad-

dendum dated August 12, 1985, Dr. Thavaradhara stated that he would need "advice" from the claimant's heart physician before he would reach the conclusion that the claimant's disability was due to heart disease alone. His opinion, therefore, will be accorded little weight due to it tentative nature. The remaining evidence clearly indicates that the claimant has a heart condition, but no other physician has stated that the claimant's disability is due to heart disease rather than lung disease. The evidence submitted, therefore, is insufficient to rebut the presumption pursuant to § 727.203(b)(3).

The last factor to consider is whether the evidence is sufficient to demonstrate that the claimant does not have pneumoconiosis. § 727.203(b)(4). In this case, however, all of the x-ray evidence is positive and the majority of the physicians expressing a full opinion on the issue have determined that the claimant does have pneumoconiosis. It is determined, therefore, that the evidence submitted is insufficient to rebut the presumption pursuant to § 727.203(b)(4). Conclusion: The presumption is rebutted pursuant to § 727.203(b)(2).

Since the claim cannot be granted pursuant to § 727.203(a), it must be considered under Subpart D of Part 410 of the regulations. *See* § 727.203(d) and *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981). The criteria for determining the existence of pneumoconiosis, including the statutory presumption, are set out in § 410.414. The evidence introduced by the claimant is insufficient to satisfy these criteria for the following reasons. As has been previously stated, the x-ray evidence is sufficient to establish the existence of pneumoconiosis [§ 410.414(a)]; however, the remaining evidence fails to estab-

lish total disability due to pneumoconiosis for the reasons outlined above.

ORDER

Finding that claimant's pneumoconiosis is not totally disabling, the claim for benefits under the Act is denied.

/s/ James J. Butler
JAMES J. BUTLER
Administrative Law Judge

San Francisco, California
JJB:mw

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board, 1111 20th Street, Suite 757, Washington, D.C. 20036.

APPENDIX E

A. The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), provides, in relevant part:

> (1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—
>
> * * * * *
>
> (2) Criteria applied by the Secretary of Labor in the case of—
>
> > (A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by

the Secretary of Labor, under section 945 (a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945 (b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

C. HEW's interim regulation, 20 C.F.R. 410.490, provides:

Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims

consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable

coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or com-

parable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

D. Labor's interim regulation, 20 C.F.R. 727.203, provides:

Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that em-

ployment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60
Above 45	Any values.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20019

(2)

No. 90-172

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

JACK ROBINETTE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT, JACK ROBINETTE, IN OPPOSITION

Thomas H. Zerbe
Counsel of Record
LARRY L. ROWE, ATTORNEYS AT LAW
1031 Quarrier Street, Suite 409
Charleston, West Virginia 25301
Phone (304) 344-1700

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Department of Labor's rebuttal provision at 20 C.F.R. Section 727.203(b)(3) violates the "not ... more restrictive" mandate of Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. Section 902(f)(2), when applied to miners who meet the invocation requirements of the Department of Health, Education and Welfare's interim presumption at 20 C.F.R. Section 410.490.

2. Whether the guarantee of due process in the Fifth Amendment to the United States Constitution prevents Congress from limiting the methods by which the Director, Office of Workers' Compensation Programs, can rebut the interim presumption at 20 C.F.R. Section 410.490.

3. Whether the Benefits Review Board can sua sponte reverse a finding of an administrative law judge that the Director, Office of Workers' Compensation Programs, has not established rebuttal of the interim presumption pursuant to 20 C.F.R. Section 727.203(b)(3) after the Director has stipulated on the record before the administrative law judge that rebuttal pursuant to Subsection (b)(3) cannot be established.

4. Whether a finding that a claimant/miner is not totally disabled by his pulmonary impairment establishes rebuttal of the interim presumption pursuant to Section 727.203(b)(3).

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No. 90-172

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

JACK ROBINETTE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT, JACK ROBINETTE, IN OPPOSITION

STATEMENT OF THE CASE

A. Introduction.

This case arises from the 1973 application of Jack Robinette, a coal miner

for thirty years, for disability benefits under the Black Lung Benefits Act of 1972 (The Act). The petitioner, the Director, Office of Workers' Compensation Programs (Director), asks this Court to review the decision of the Fourth Circuit remanding the case for payment of disability benefits. Specifically, the Director asks this Court to review the Fourth Circuit's decision that the Department of Labor's (DOL) regulation at 20 C.F.R. Section 727.203(b)(3) is invalid because it conflicts with the Congressional mandate in Section 402(f)(2) of the Act [30 U.S.C. 902 (f)(2)] as amended in 1977 by the Black Lung Benefits Reform Act.

Section 727.203(b)(3) [hereinafter (b)(3) rebuttal] is one of the four methods provided by the DOL regulations for rebutting the interim presumption in

Section 727.203(a). The interim presumption presumes a miner is totally disabled due to pneumoconiosis arising out of coal mine employment. If the presumption is unrebutted, the miner is entitled to disability benefits.

It is not disputed that the interim presumption was properly invoked by the Administrative Law Judge (Judge) in Robinette's behalf and that Robinette is entitled to benefits if the presumption is unrebutted.

The Benefits Review Board (BRB or Board) denied the claim holding sua sponte that (b)(3) rebuttal was established, thereby reversing the Judge's finding that (b)(3) rebuttal was not established. The Fourth Circuit reversed holding (b)(3) rebuttal to be invalid because it conflicts with Section 402(f)(2) of the Act. Since

(b)(3) rebuttal was the only means by which the BRB held rebuttal to be established, the Fourth Circuit remanded for payment of benefits.

The Director filed a petition for a writ of certiorari with this Court. Robinette opposes the petition on the grounds that whether or not (b)(3) rebuttal is valid will not affect the outcome of this case. Even if DOL's method for establishing rebuttal in Subsection (b)(3) is held to be valid, the Fourth Circuit's decision remanding the case for payment of benefits will have to be sustained on other grounds.

The Fourth Circuit's decision will have to be sustained because (b)(3) rebuttal was not established. It was not established for two reasons. First, the Director stipulated on the record at the

hearing that (b)(3) rebuttal could not be established. When the BRB found that (b)(3) rebuttal was established, the Board overlooked the stipulation. The stipulation was not pointed out to the Board because (b)(3) rebuttal was not an issue before the Board. The Board's decision that (b)(3) rebuttal was established was sua sponte.

Second, the Judge's conclusion that (b)(3) rebuttal was not established is supported by substantial evidence. Even though the Judge's decision states that (b)(3) rebuttal is not an issue, the Judge, nevertheless, reviewed the evidence and found (b)(3) rebuttal not to be established. When the BRB reversed the Judge's finding as to (b)(3) rebuttal, the Board applied an erroneous legal standard, which has been discredited by the Fourth

Circuit and every other circuit that has considered the question.

Jack Robinette applied for benefits in 1973. His case has been pending for seventeen years. His claim for benefits is established regardless of the outcome of the question raised by the petitioner. In fairness to Robinette, in order to avoid further delay and to promote judicial efficiency, the petition for a writ of certiorari should be denied.

B. This Case.

In 1973 Jack Robinette filed a claim for disability income benefits under the Black Lung Benefits Act of 1972. After HEW denied the application it was referred to the Department of Labor who, pursuant to 30 U.S.C. Section 945(a)(3)(A), properly treated it as if it had been filed with the Department of Labor. The Department

of Labor denied the application and Jack Robinette requested a hearing before an administrative law judge.

A hearing was held on July 10, 1985 before an administrative law judge. At hearing, counsel for the Director stipulated that Robinette had worked thirty years in coal mine employment and that he had pneumoconiosis. See transcript of hearing in App., infra., 7a-8a, 12a.

It should be noted that on page 7a, where the Judge refers to the standard form indicating the issues, he is referring to the Deputy Commissioner's form listing the possible issues in black lung litigation. Any party opposing entitlement is required to inform the Deputy Commissioner which issues he contests by checking those issues on the Deputy Commissioner's form. See C.F.R. 725.463(c). Since pneumoconiosis

was not checked, it means the Director waived his right to contest the existence of pneumoconiosis. See Thornton v. Director, 8 BLR 1-277 (1985). The Director never contested the existence of pneumoconiosis either on the list of contested issues, at hearing, or at any level of appeal.

The interim presumption is invoked pursuant to Section 727.203(a)(1) if a miner has ten or more years of coal mine employment and pneumoconiosis. The Director, therefore, stipulated to the invocation of the interim presumption when he stipulated to thirty years of coal mine employment and the existence of pneumoconiosis.

The Director further stipulated that "causation" was not an issue. App., infra., 7-8a, 14a, 17a. "Causation" is

the issue in the method for establishing (b)(3) rebuttal. Rebuttal is established pursuant to Subsection (b)(3) if the evidence establishes that the miner's total disability does not arise in whole or in part from coal mine employment.

The language in Subsection (b)(3) states that rebuttal is established if:

> "(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment." 20 CFR 727.203(b)(3)

Rebuttal pursuant to (b)(3) is often referred to as the "causation" issue.

It should be noted that even though the miner's pneumoconiosis is not in and of itself totally disabling that will not establish rebuttal. To establish (b)(3)

rebuttal, coal worker's pneumoconiosis must be ruled out as even a partial cause of the miner's disability. See Bethlehem Mines Corporation v. Massey, 736 F.2d 120 (4th Circuit 1984).

The Director further stipulated that the only rebuttal issue he was raising was the issue of "total disability," which is the issue in the method provided for establishing rebuttal pursuant to Section 727.203(b)(2) [hereinafter (b)(2) rebuttal]. App., infra., 7a-8a, 14a, 17a, 20a.

"Total disability" is defined in 20 C.F.R. Section 725.101(a)(21) referencing Section 718.204(b)(1) and (2) as the inability to perform the miner's usual coal mine work or comparable work. Rebuttal pursuant to (b)(2) is established if the miner is able to do his usual coal

mine work or comparable work, which is the definition of being totally disabled. Rebuttal pursuant to (b)(2) is often referred to as the issue of "total disability."

The record was held open for forty-four days for the post-hearing development of evidence. App., infra., 9a-11a. A medical report from Dr. Pathon Thavradhara, known as Dr. Pathon, was admitted into evidence post-hearing as Director's Exhibit 52. Pet. App., 17a. Both parties were given the opportunity to respond to Dr. Pathon's report. App., infra, 10a. Neither did so.

Because it was established that Jack Robinette had more than ten years of coal mine employment and that he had pneumoconiosis, the Judge found him entitled to the interim presumption that

he is totally disabled due to pneumoconiosis arising out of coal mine employment. Pet. App., 18a-19a.

In his decision, the Judge states, "The only issue presented for decision is whether the claimant is totally disabled." Pet. App., 17a. The Judge found, however, that the Director had established rebuttal pursuant to Subsection 727.203(b)(2) because the evidence established that Robinette's pulmonary impairment was not totally disabling. Pet. App., 21a-22a.

Even though the Director conceded that the only issue was total disability and even though the Judge's decision states that the only issue is disability, the Judge nevertheless reviewed the evidence as to the other three methods by which rebuttal can be established pursuant to Sections 727.203(b)(1), (b)(3) and

(b)(4). The Judge found that the evidence did not support rebuttal under any of the other methods of establishing rebuttal. Pet. App., 20a-23a. Since, however, rebuttal was established pursuant to Subsection (b)(2), the claim was denied.

Jack Robinette appealed to the Benefits Review Board (BRB). No cross appeal was filed. The BRB issued its decision and order on September 22, 1982. Pet. App., 8a-12a.

The BRB reversed the Judge's finding that (b)(2) rebuttal was established, citing Sykes v. Director, OWCP, 812 F.2d 890, 10 BLR (4th Circuit, 1985). The Board found, based on the standard for (b)(2) rebuttal set forth in Sykes v. Director OWCP, that (b)(2) rebuttal was not established. The Judge had found (b)(2) rebuttal established because he

found that Robinette was not totally disabled by his pulmonary impairment alone. The BRB reversed because Sykes v. Director, OWCP held that to establish (b)(2) rebuttal the evidence must show that the miner is not disabled considering all of his disabilities. The Director has never challenged the BRB's finding that (b)(2) rebuttal was not established.

Even though the Judge had found that rebuttal was not established by any method except the one provided by Subsection (b)(2), the BRB did not grant the claim. Instead, the BRB reversed, sua sponte, the Judge's finding that rebuttal under Section 727.203(b)(3) was not established. The BRB held that even though the Judge had applied an incorrect legal standard to (b)(2) rebuttal, the findings of fact relied upon by the Judge to establish

(b)(2) rebuttal would establish (b)(3) rebuttal.

The BRB reversed the finding that (b)(3) rebuttal was not established even though it was not an issue before the Board. The Director had not raised the issue on appeal and the Director had stipulated at the hearing that "causality" [(b)(3) rebuttal] was not an issue and "total disability" [(b)(2) rebuttal] was the only issue.

Since the BRB found that rebuttal was established pursuant to (b)(3) it held that the Judge's reliance on (b)(2) rebuttal was harmless. The BRB, therefore, held that the claim was not established because the interim presumption was rebutted.

Having found that Jack Robinette was not entitled to disability benefits under

the DOL's interim presumption, the BRB remanded the case for consideration of entitlement under HEW's interim presumption at Section 410.490. The Director moved the BRB to reconsider its order of remand. On June 23, 1988, the BRB withdrew its order to remand and affirmed the denial of the claim for disability income benefits, holding Section 410.490 inapplicable to claims reviewed by the DOL.

Robinette then appealed the BRB's decisions to the Fourth Circuit. In an unpublished decision, the court of appeals reversed the BRB and remanded for payment of benefits. Pet. App., 1a-7a. Relying on its previous decisions in Taylor v. Clinchfield Coal Company, 895 F.2d 178 (4th Circuit, 1990), petition for cert. pending, No. 90-113 (filed July 17, 1990),

and Dayton v. Consolidation Coal Company, 895 F.2d 174 (4th Circuit, 1990), petition for cert. pending, No. 90-114 (filed July 17, 1990), the court held that (b)(3) rebuttal in the DOL's interim presumption was an additional means of rebuttal not found in the HEW's rebuttal provisions in Section 410.490. The court concluded, therefore, that DOL's Section 727.203(b)(3) violated Section 402(f)(2) of the Act which prohibits the use of more restrictive criteria in the DOL's interim provision than existed in the HEW's interim provision at Section 410.490. The case was remanded to the BRB with instructions to award benefits.

The petitioner asks this Court to review the Fourth Circuit's decision that (b)(3) rebuttal is invalid. The petitioner raises one of the issues left

unresolved by Pittston Coal Group v. Sebben, 109 S.Ct. 414 (1988). Sebben was concerned with the effect of Section 402(f)(2) of the DOL's interim presumption at 20 C.F.R. Section 707.203(a).

The Sebben case compared the criteria for invoking the interim presumption under DOL's regulations with the Department of Health, Education and Welfare's (HEW) criteria for invoking the interim presumption. If invoked under either HEW's or DOL's regulations, the interim presumption presumes that the miner is totally disabled due to pneumoconiosis arising from his coal mine employment. All the elements of entitlement are, therefore, established and the miner is entitled to benefits unless the presumption is rebutted.

In Sebben this Court held that DOL's criteria for invoking the interim presumption is more restrictive than HEW's. Under DOL's criteria one of the methods for invoking the rebuttable interim presumption in Section 727.203(a) is by establishing that the miner has pneumoconiosis and ten years of coal mine employment.

HEW's regulations at 410.490(b) provide an identical method of invoking the rebuttable presumption, except it provides an alternative for the miner who has less than ten years of coal mine employment. If the miner does not have ten years of coal mine employment, he can still invoke the presumption pursuant to Section 410.490(b)(2) by establishing that his pneumoconiosis arose from coal mine employment. Under HEW's regulations the

miner does not need ten years of coal mine employment to invoke the presumption, if he can prove that his pneumoconiosis arose from his coal mine employment.

Since DOL's regulation provides no means for establishing the interim presumption without proving ten years of coal mine employment, this Court held in Sebben that DOL's criteria for invoking the presumption was more restrictive than HEW's.

This Court concluded, therefore, that DOL's interim presumption is invalid in so far as it does not permit miners with pneumoconiosis arising from their coal mine employment to invoke the interim presumption unless they have ten years of coal mine employment. This part of DOL's interim presumption is invalid because it violates the Congressional mandate in

Section 402(f)(2) of the Act that DOL promulgate new interim regulations which would apply criteria that would be no more restrictive than the HEW interim standards in Section 410.490.

Specifically left open in Sebben was the question of whether some of the methods provided by DOL's regulation at Section 727.203(b) for rebutting the interim presumption are invalid because there is no equivalent method of rebuttal in HEW's criteria for rebuttal in Section 410.490. Since DOL's interim criteria for rebuttal permits more methods for establishing rebuttal than HEW's Section 410.490, are they invalid because they make DOL's criteria for entitlement more restrictive than Section 410.490?

This case arises from the ruling of the Fourth Circuit that the method of

establishing rebuttal provided by DOL at 20 C.F.R. 727.203(b)(3) [(b)(3) rebuttal] is invalid because there is no equivalent to (b)(3) rebuttal in HEW's Section 410.490. Since DOL's (b)(3) rebuttal provides a more restrictive criteria for entitlement than HEW's Section 410.490, the Fourth Circuit concluded that (b)(3) rebuttal violates Section 402(f) of the Act.

Subsection (b)(3) provides that the party opposing entitlement can rebut DOL's interim presumption by establishing that the coal worker's pneumoconiosis from which the miner suffers is not a causal factor in the miner's disability. There is no equivalent of (b)(3) rebuttal in HEW's methods of rebuttal in Section 410.490.

Under Section 410.490 once the interim presumption is invoked, it can be rebutted pursuant to Subsection (c) only by showing that the miner is doing his coal mine work or is capable of doing his coal mine work. There is no means in Section 410.490 for rebutting the presumption by ruling out the miner's pneumoconiosis as a cause of the miner's disability.

The explanation of why nothing similar to (b)(3) rebuttal was provided in HEW's regulations is found in Section 410.490(a). Section 410.490 was HEW's response to Congressional concern that the techniques and resources for the diagnosis and evaluation of pneumoconiosis were limited.

Once a miner establishes he has pneumoconiosis, either by clinical

diagnosis or by invoking the presumption, HEW believed that, given the limited medical techniques and resources available, it was not possible to rule out pneumoconiosis as a factor in the miner's disability. The language in Section 410.490(a) specifically states that a pulmonary impairment cannot be ruled out by ventilatory studies alone and refers to the Congressional perception that it is not feasible to perform extensive pulmonary testing to rule out all types of pulmonary impairment. (In Robinette's case no exercise blood gas study was ever performed.) Section 410.490(a) also refers to the Congressional perception that coal worker's pneumoconiosis cannot be ruled out by chest x-rays alone.

Since DOL's (b)(3) rebuttal is a "more restrictive" criteria for granting

disability benefits than that provided for rebuttal by HEW in Section 410.490, the Fourth Circuit held that (b)(3) rebuttal is invalid. This is the question which the petitioner asks this Court to review.

Respondent Robinette, however, contends that it is not necessary to reach the issue raised by the petitioner. It is not necessary to decide whether (b)(3) rebuttal is valid because (b)(3) rebuttal was not established.

Rebuttal pursuant to Subsection (b)(3) was not established for two reasons. First the Director stipulated on the record at hearing that (b)(3) rebuttal could not be established.

Second, even though the Judge found that (b)(3) rebuttal was not an issue, he nevertheless reviewed the evidence and found that (b)(3) rebuttal was not

established. Even if the stipulation is ignored, the Judge's decision based on the medical evidence is supported by substantial evidence.

REASONS FOR DENYING THE PETITION

Jack Robinette opposes the pending petition for certiorari by the Director, because the issue raised by petitioner would not change the resolution of this case. Even if the petitioner were to prevail on the issue he raises, the decision of the Fourth Circuit would be affirmed on other grounds.

The petitioner contends that the United States Court of Appeals for the Fourth Circuit incorrectly held that the method of establishing rebuttal provided at 20 C.F.R. Section 727.203(b)(3) is invalid because it violates the not more restrictive mandate of Section 402(f)(2)

of the Reform Act. It is not necessary, however, to reach this issue because (b)(3) rebuttal was not established.

Rebuttal under Subsection (b)(3) was not established for two reasons. First, the Director stipulated on the record at the hearing before the Judge that rebuttal pursuant to Subsection (b)(3) was not an issue and that the only issue was whether rebuttal pursuant to Subsection (b)(2) could be established.

Second, even though the Judge's decision stated that (b)(2) rebuttal was the only issue, which is what the Director stipulated to at the hearing, the Judge nevertheless reviewed the evidence and found that it did not establish (b)(3) rebuttal. Even ignoring the Director's stipulation, the Judge's decision on (b)(3) rebuttal is supported by

substantial evidence. When the BRB reversed the Judge's findings on (b)(3) rebuttal, it not only ignored the Director's stipulation, it also applied the wrong legal standard to (b)(3) rebuttal.

The fact that (b)(3) rebuttal was not established for these two reasons was raised by Robinette in the Fourth Circuit. The Fourth Circuit chose, however, to decide this case solely on the legal conclusion that (b)(3) rebuttal is invalid because it violates the Congressional mandate in Section 402 of the Act. See Robinette's brief in the Fourth Circuit in Appendix B pp. 41a-48a, where Robinette raised the fact that the Director stipulated that (b)(3) rebuttal was not an issue. See also Robinette's reply brief in the Fourth Circuit in

Appendix C pp. 70a-77a, where Robinette raised the fact that the Judge's decision that (b)(3) was not established was supported by substantial evidence.

The issue raised by petitioner is important but it would not affect the outcome of this case. Even if this Court were to reverse the Fourth Circuit's legal conclusion that (b)(3) rebuttal is invalid, it should still affirm the Fourth Circuit's award of benefits on the grounds that (b)(3) rebuttal was not established.

First, (b)(3) rebuttal was not established simply because the Director stipulated that it was not established. When the BRB reviewed the Judge's finding that (b)(3) rebuttal was not established, it ignored the fact that the Director had stipulated several times on the record at the hearing that (b)(3) rebuttal could not

be established and the only issue was (b)(2) rebuttal.

This stipulation was not pointed out to the BRB in the briefs to the BRB because the Judge's finding that (b)(3) rebuttal was not established was not raised on appeal to the BRB. The BRB's reversal of the Judge's finding as to (b)(3) rebuttal was sua sponte.

Counsel for the Director stated several times on the record that "causality", which is the (b)(3) rebuttal issue, was not contested and that the only issue was "total disability," which is the (b)(2) rebuttal issue.

At the beginning of the hearing, the Director's counsel stated that the only issue was total disability. After a discussion of the issues, the following exchange took place between the Judge and

attorney Mark Malecki, counsel for the Director:

> JUDGE BUTLER: Okay. Then the only issue at hand is the question of total disability? (emphasis added)
>
> MR. MALECKI: Yes, Your Honor.

Later counsel for the claimant asked for a clarification. The following exchange took place between Sunya Anderson, counsel for Jack Robinette; the Judge; and counsel for the Director:

> MS. ANDERSON: Could I ask for a clarification on the record? I'm sorry. This isn't exactly in order.
>
> JUDGE BUTLER: Yes.
>
> MS. ANDERSON: I was sort of surprised this morning

causation was not in issue (emphasis added) and total disability is, only.

MR. MALECKI: Well, that it what is checked on the controversion sheet.

MS. ANDERSON: Okay.

MR. MALECKI: I could raise it but I don't think I am going to.

MS. ANDERSON: Okay.

(Pause.)

JUDGE BUTLER: Well, then we are agreed we are proceeding solely on the issue of total disability? (emphasis added)

MR. MALECKI: Yes, Your Honor.

App., infra., 14a.

The stipulation was clear that "causation" or (b)(3) rebuttal was not an issue and the only issue was "total disability" or (b)(2) rebuttal. Jack Robinette was entitled to rely on that stipulation.

Since the record was held open for the post-hearing receipt of evidence, Robinette had the opportunity to submit additional evidence and did not. Had he known that (b)(3) rebuttal was an issue, he could have submitted additional evidence on that issue.

Upon the motion of the Director, the record was held open for thirty days for receipt of a report by Dr. Pathon Thavradhara, known as Dr. Pathon. App., infra., 9a-10a. The report was received from the Director post-hearing and admitted as Director's Exhibit 52. Pet.

App., 17a. After the receipt of Dr. Pathon's (Thavradhara's) report, both parties were given fourteen days, or longer if they needed, to respond to Dr. Pathon's report. App., infra., 10a-11a. Neither party submitted a response. If Robinette had known that (b)(3) rebuttal was an issue, he might have submitted post-hearing evidence.

The BRB's ignoring of the Director's stipulation that (b)(3) rebuttal was not established, was undoubtedly a factual mistake. Had the BRB noted the stipulation, its own case law would have required it to find that (b)(3) rebuttal was not established.

The BRB has held that if the opposing party stipulates to a fact or issue at the hearing, then the claimant is relieved of any burden of proving it. Cooley v.

Alabama By Products Corporation, 5 BLR 819 (1983), footnote 4 at 5 BLR 819; and Backert v. Director, 6 BLR 1-640 (1983).

The BRB cannot reverse a finding of fact stipulated by the parties at hearing. By the BRB's own case law, Jack Robinette was relived of any burden he may have had, if any, to submit evidence pertaining to (b)(3) rebuttal.

Assuming arguendo that the Director had not stipulated that (b)(3) rebuttal was not established, the Judge's finding that (b)(3) rebuttal was not established must still be upheld. Even though the Director stipulated that (b)(3) rebuttal was not an issue, and even though the Judge in his decision stated that the only issue was total disability, the Judge nevertheless reviewed the evidence and

found that it did not support (b)(3) rebuttal. Pet. App., 22a-23a.

The Judge's finding with regard to (b)(3) rebuttal is supported by substantial evidence. A Judge's findings of fact are binding upon the BRB if they are supported by substantial evidence. Kertesz v. Crescent Hills Coal Company, 788 F.2d 158, 162 (3rd Circuit, 1986).

When the BRB reversed the Judge's findings it applied an incorrect legal standard to (b)(3) rebuttal. The BRB held "that the administrative law judge's rebuttal findings as to (b)(2) are affirmable under (b)(3) ..." Pet. App., 10a. The Judge's findings of fact as to (b)(2) rebuttal do not, however, sustain (b)(3) rebuttal.

The Judge found that (b)(2) rebuttal was established because Jack Robinette did

not have a totally disabling lung impairment. The applicable BRB standard at that time was that (b)(2) rebuttal was established if it was shown that the miner's pulmonary impairment alone was not in itself totally disabling. See Sykes v. Itmann Coal Company, 2 BRB 1-1089 (1980).

The BRB states in its decision that it is reversing the Judge's finding as to (b)(2) rebuttal because "subsequent to the issue of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit held in Sykes v. Director, OWCP, (citations omitted) that to establish (b)(2) rebuttal the opposing party must show that the miner is not disabled 'for whatever reason.'" (Pet. App., 9a-10a) Sykes v. Director, OWCP held that to sustain (b)(2) rebuttal all the miner's

disabilities have to be considered, not just his pulmonary disabilities.

The Judge's finding that Robinette's lung impairment was not in itself totally disabling does not sustain (b)(3) rebuttal. To establish (b)(3) rebuttal the party opposing entitlement must rule out pneumoconiosis as causing even part of the miner's total disability. See Bethlehem Mines Corporation v. Massey, supra. A finding that the miner's pulmonary impairment is not in and of itself totally disabling is not the same as a finding that the miner's pulmonary impairment is not even a partial factor in the miner's total disability.

The BRB incorrectly equated the former standard for (b)(2) rebuttal, establishing that the miner's pulmonary impairment was in and of itself totally

disabling, as being the same as the present standard for (b)(3) rebuttal, ruling out that the miner's disability arises even partly from pneumoconiosis. The two are not the same. Just because a pulmonary impairment is not in and of itself totally disabling it can still be a partial cause of the miner's total disability. Total disability is frequently caused by the interplay of several different impairments.

Establishing that the miner is not totally disabled because of his pulmonary impairment does not establish rebuttal under any method provided for establishing rebuttal in Section 727.203(b). It is true that the BRB has held at various times that such a finding would establish either (b)(2) or (b)(3) rebuttal, but the Board has been reversed consistently by

every circuit court that has considered the issue.

In Sykes v. Itmann Coal Company, supra, the BRB maintained that a finding that the miner is not totally disabled from a pulmonary impairment would establish (b)(2) rebuttal. This position has been rejected, however, by every circuit court that considered it[1] because it is contrary to the plain language of Subsection (b)(2). See Sykes v. Director, OWCP, supra; Martin v. Alabama By-Products Corporation, 864 F.2d 1555 (11th Circuit, 1989); York v. Director, OWCP, 819 F.2d 134 (6th Circuit, 1987), Wetherill v.

[1]The Tenth Circuit in Mitchellson v. Director, OWCP, 880 Fed. 265 at 669, stated that it accepted the BRB's interpretation of (b)(2) "for purposes of this case" because it was supported by DOL and the employer and unchallenged by the claimant.

Director, OWCP, 812 F.2d 376, 379 (7th Circuit, 1987); Kertesz v. Crescent Hills Coal Company, 788 F.2d 158, 162 n. 5 (3rd Circuit, 1986); Oravitz v. Director, OWCP, 843 F.2d 740 (Third Circuit, 1988); Ramey v. Kentland Elkhorn Coal Company, 755 F.2d 485, 486 n. 3 (6th Circuit, 1985).

These cases hold that the plain language of (b)(2) rebuttal requires that the party opposing entitlement establish that the miner is able to do his usual coal mine work or comparable and gainful work. Subsection (b)(2) states that rebuttal is established if

> (2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see Section

410.412(a)(1) of this title)...

As the Fourth Circuit states in Sykes v. Director, supra, "Section 727.203(b)(2) is concerned with the question of whether miners are totally disabled for whatever reason" (emphasis added). 812 F.2d at 893-894. A finding that the miner is not disabled due to his pulmonary impairment alone does not, therefore, establish (b)(2) rebuttal because all the miner's impairments have to be considered.

The BRB also once took the position that a finding that the miner was not totally disabled due to a pulmonary impairment would establish (b)(3) rebuttal. See Jones v. The New River Company, 3 BLR 1-199 (1981). This also was rejected by every circuit court that considered it. See Gibas v. Saginaw Mining Company, 748 F.2d 1112, 7 BLR 2-53

(6th Circuit, 1984); Bethlehem Mines Corporation v. Massey, supra,; Alabama By-Products Corporation v. Killingsworth, 733 F.2d 1511, 6 BLR 5-59 (11th Circuit, 1984) and Carozza v. United States Steel Corporation, 727 F.2d 74, 6 BLR 2-15 (3rd Circuit, 1984). As a result the BRB reconsidered its decision in Jones and reversed it in an en banc decision in Borgeson v. Kaiser Steel Corporation, 8 BLR 1-312, 1985.

The holding in these cases is that the party opposing entitlement must rule out pneumoconiosis even as a partial cause of the miner's disability in order to establish (b)(3) rebuttal. Establishing that a miner is not totally disabled by his pulmonary impairment alone does not establish (b)(3) rebuttal because it does not rule out pneumoconiosis as a

contributing cause to the miner's total disability.

In the instant case the BRB concluded that the Judge's factual finding as to (b)(2) rebuttal would not sustain (b)(2) rebuttal after Sykes v. Director, OWCP but it would sustain (b)(3) rebuttal. This is incorrect. A finding that a miner is not totally disabled due to a pulmonary impairment does not sustain either (b)(2) or (b)(3) rebuttal. The Board applied an incorrect standard to (b)(3) rebuttal when it reversed the Judge's finding that (b)(3) rebuttal was not established.

Since (b)(3) rebuttal was never established, it is not necessary to reach the issue of whether or not Subsection (b)(3) is valid.

Rebuttal was not established pursuant to Subsection (b)(3) for two reasons.

First, because the Director stipulated it was not established. Second, there is substantial evidence to support the Judge's finding that, based on the evidence, (b)(3) rebuttal was not established.

The Fourth Circuit decided the case solely on the legal conclusion that (b)(3) rebuttal was invalid. The fact that (b)(3) rebuttal was not established because of the Director's stipulation and the Judge's finding, based on the evidence, is not, however, a new issue. Both of these points were raised by Robinette in the Fourth Circuit. App., infra., 41a-49a and 70a-79a.

It is conceded that the issue raised in the Director's petition to this Court is important. The same question is raised by petitions for certiorari pending in

four other cases: Pauley V. Bethenergy Mines, Inc., No. 89-1714, Peabody Coal Company v. Taylor, No. 89-1696; Clinchfield Coal Company v. Taylor, No. 90-113, and Consolidation Coal Company v. Dayton, No. 90-114.

The petition in this case, however, should not be granted because the legal issue presented would not change the outcome of this case. Even if it were held that DOL's method of establishing rebuttal provided in Subsection (b)(3) is valid, it makes not difference in this case because (b)(3) rebuttal was not established. The decision of the Fourth Circuit remanding the claim for payment of benefits would, therefore, have to be reversed on other grounds.

CONSIDERATIONS FOR GRANTING PLENARY REVIEW

The petition for a writ of certiorari should be denied. If it is granted, then this case is a good candidate for plenary review.

The Solicitor General has suggested that Robinette not be granted plenary review. Pet. Brief 6-7. The Solicitor General suggests that either Pauley v. Bethenergy Mines, supra or Consolidation Coal v. Dayton, supra be accepted for plenary review and Robinette be disposed of in light of the decision in Pauley or Dayton. Pet. Brief 7.

It is the position of Robinette that Pauley be given plenary review or, if not Pauley, then either Robinette or Peabody v. Taylor, supra should be given plenary review. In Pauley, Robinette and

Peabody/Taylor, three of the five cases where petitions for certiorari are pending, the interim presumption was invoked by x-ray diagnosis of pneumoconiosis. One of the x-ray cases should be granted plenary review because they raise different questions than the others and because most of the petitions before the Court are x-ray cases.

If the interim presumption is invoked by chest x-ray under Section 410.490, a means of rebuttal may exist that does not exist in the other cases. Rebuttal pursuant to 410.490(c)(1) showing that the miner is doing his coal mine work or (c)(2) showing the miner is capable of doing his coal mine work is available regardless of the method of invocation. An additional means of rebuttal may be

available, however, if invocation occurs by positive chest x-rays.

If the miner invokes, by chest x-ray, pursuant to (b)(1)(i) he is required by 410.490(b)(2) to show that his pneumoconiosis arose from coal mine employment. If he has ten years of coal mine employment, he is entitled to a presumption that his pneumoconiosis arose out of coal mine employment. The presumption that the ten year miner's pneumoconiosis arose from coal mine employment is provided by the references to Section 410.416 and 410.456 in Section 410.490(b)(2).

This presumption is, however, rebuttable. Sections 410.416 and 410.456 state that if the miner suffering from pneumoconiosis has ten years of coal mine employment, "it will be presumed, in the

absence of persuasive evidence to the contrary, that pneumoconiosis arose out of such employment" (emphasis added). This is an additional means of rebuttal not provided in Section 410.490(c)(1) and (c)(2).

If invocation occurs by ventilatory studies and fifteen years of coal mine employment pursuant to Section 410.490(b)(1)(ii), the presumption that the miner's pneumoconiosis arose from coal mine employment arises from Section 410.490(b)(3). Section 410.490(b)(3) states on its face that it does not apply if invocation occurred by positive chest x-rays pursuant to Section (b)(1)(i). No rebuttal of the presumption that pneumoconiosis arose from coal mine employment is provided in Section

410.490(b)(3). Rebuttal is limited to that provided at 410.490(c)(1) and (c)(2).

Since the cases where invocation occurred by chest x-rays may allow an additional means of rebuttal, one of those cases should be taken for plenary review in order that all the rebuttal possibilities can be explored and decided. Either Pauley, Robinette or Peabody/Taylor should be granted plenary review.

In considering which case or cases to accept for plenary review, it should be noted that Robinette raises a question of constitutional law not raised in the other cases. In each of the other cases, the coal operator opposing entitlement has raised the issue as to whether Congress' limiting of the methods of rebuttal available violate their constitutional guarantee of due process of law. The due

process question is also raised by the Director's petition in Robinette where the petitioner lists the "Questions Presented." The due process question presented in Robinette is different, however, from the other cases.

There is no coal operator opposing entitlement in Robinette. The only party opposing entitlement in Robinette is the Director. It is doubtful that the Director has any constitutional due process rights which the Director can assert against Congressional legislation. If Section 402(f)(2) of the Act violates the constitutional due process rights of the various coal operators opposing entitlement in the other cases, it does not follow that the Director's constitutional due process rights have been violated. Possibly plenary review

should be granted in both Pauley, which has a coal operator opposing entitlement, and Robinette in order that the constitutional question in each factual situation can be fully resolved.

CONCLUSION

Regardless of the outcome of the question the petitioner presents for review, the decision of the Fourth Circuit will be sustained on other grounds. Since Robinette's application for disability benefits is seventeen years old, the resolution of his case should not be needlessly delayed. The petition for writ of certiorari should be denied.

If a writ of certiorari is granted, then plenary review should be granted in Pauley or one of the other x-ray cases, Robinette or Peabody/Taylor, in order that

the unique questions in x-ray cases can be resolved.

If a writ of certiorari is granted in Robinetts, it should be granted plenary review in order that the constitutional due process questions can be resolved in fact situations where entitlement is opposed only by the Director.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-172

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

JACK ROBINETTE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO
BRIEF OF RESPONDENT, JACK ROBINETTE,
IN OPPOSITION

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APPENDIX A

APPENDIX A IS THE ENTIRE TRANSCRIPT OF THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE EXCEPT FOR THE TESTIMONY OF JACK ROBINETTE, WHICH HAS BEEN OMITTED BECAUSE IT IS IRRELEVANT FOR THE PURPOSES OF THIS APPENDIX.

BEFORE THE
U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

JACK ROBINETT,

Claimant,

v. Case No. 83-BLA-4939

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION
PROGRAMS,

Respondent.

Pages 1 through 41

Place: Charleston, West Virginia

Date: July 10, 1985

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BEFORE THE
U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

JACK ROBINETT,

Claimant,

v. Docket No. 83-BLA-4939

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION
PROGRAMS,

Respondent.

Judicial Annex Building
Kanawha County Courthouse
111 Court Street
Charleston, West Virginia

Wednesday, July 10, 1985

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

BEFORE: HONORABLE JAMES J. BUTLER,
Administrative Law Judge

APPEARANCES:

On behalf of the Claimant:

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Charleston, West Virginia 25325

On behalf of the Respondent:

MARK MALECKI, ESQ.
Office of the Solicitor
U. S. Department of Labor
4015 Wilson Blvd., Room 1237-A
Arlington, Virginia 22203

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Jack Robinett	9	20	--	--

EXHIBITS	FOR IDENTIFICATION	IN EVIDENCE
Director's:		
D-1 thru D-51	4	6

P R O C E E D I N G S

(9:05 a.m.)

JUDGE BUTLER: On the record.

This case comes on this morning in the matter of Jack Robinett versus Director, OWCP. It is Case No. 83-BLA-4939 which carries a corresponding OWCP number of 232-34-8295. My name is James J. Butler, assigned to hear the case this morning, and my address is as indicated on your Notice of Hearings.

For the record, may I have your formal entry of appearance please. For the Claimant.

MS. ANDERSON: My name is Sunya Anderson of the United Mine Workers of America, District 17. My address is Post Office Box 1313, Charleston, West Virginia 25325. My phone number is area code 304, 346-0341.

MR. MALECKI: Good morning, Your Honor. For the Director, I am Mark Malecki. My address is U. S. Department of Labor, 4015 Wilson Boulevard, Room 1237-A, Arlington, Virginia, zip code 22203. My telephone number is area code 703, 235-3610.

JUDGE BUTLER: Thank you very much. As the first order of business, and pursuant to the applicable regulation, I will produce and offer into the record for decision all of the exhibits previously furnished me by the Director which are numbers 1 through 51, Exhibit No. 51 being the standard Form 1025 indicating that the issues at hand this morning are item number four, the length of employment, that is whether or not the miner worked at least thirty years in or around one or more coal mines; and, lastly, item number seven,

total disability, that is whether or not the miner is totally disabled.

(The documents referred to were marked for identification as Director's Exhibits Nos. 1 thru 51, respectively.)

JUDGE BUTLER: Are there any other issues at hand this morning?

MR. MALECKI: Your Honor, in this case the Director is prepared to stipulate to thirty years of coal mine employment. So, I don't think it is necessary to raise that issue at this time. We have no additional issues.

JUDGE BUTLER: Okay. Then the only issue at hand is the question of total disability?

MR. MALECKI: Yes, Your Honor.

JUDGE BUTLER: All right.

(Pause.)

Does the Claimant have any documentary evidence they would like to produce and offer at this time?

MS. ANDERSON: No, Your Honor.

JUDGE BUTLER: Does the Director have any documentary evidence?

MR. MALECKI: Your Honor, at this time the Director has got no documents to add. We had forwarded some hospital records to the parties, however, it turned out that those were already in the record, so I won't offer them again. And, in addition, Your Honor, for the record, I would like to note that the Claimant and the Director have agreed to submit to Your Honor a report of a physical that was already undertaken on May 28th, 1985. We are, however, still awaiting the report. Apparently through some backlog in the

doctor's calendar we were unable to get that for today.

The parties have agreed -- I believe I can represent that -- that we will keep the record open for the receipt of that report and then allow both parties to review the validity of the spirometry report in Doctor Pathon's report. I expect that we could receive Doctor Pathon's report certainly within thirty days and that it would be necessary to keep the record open perhaps for another fourteen days to review the spirometry.

JUDGE BUTLER: All right. Once the medical report in question is received, unless I hear from you within fourteen days, I will assume that the record for decision will be closed thereafter.

MS. ANDERSON: Your Honor, could we lengthen that a little bit. I think two

weeks might be a little short to get a doctor to review and write us a report. Could we make that thirty days?

JUDGE BUTLER: Well, I will give you fourteen days to indicate to me that you are going to have it reviewed.

MS. ANDERSON: All right.

JUDGE BUTLER: And, then I will give you whatever time is necessary.

MS. ANDERSON: All right. Thank you, sir.

JUDGE BUTLER: But let me know within fourteen days after receipt of the report whether or not you are going to --

MS. ANDERSON: Okay.

JUDGE BUTLER: -- submit it to another physician for his opinion.

MS. ANDERSON: Yes.

JUDGE BUTLER: So, the record will be kept open for that purpose. And, if there

are no objections to the Director's exhibits, numbers 1 through 51 --

MR. MALECKI: No, Your Honor.

MS. ANDERSON: No.

JUDGE BUTLER: -- they will now be made a part of the record for decision.

(The documents referred to, having been previously marked for identification as Director's Exhibits Nos. 1 thru 51, respectively, were received in evidence.)

JUDGE BUTLER: Does the Claimant have an opening statement to make at this time?

MS. ANDERSON: Just shortly, Your Honor, in that the Director does not contest the existence of pneumoconiosis and in that the Claimant had over ten years of coal mine employment, the interim presumption at 727.203 is invoked as a

matter of law, and the only issue in this case is rebuttal. Therefore, I would like to defer my remarks until after the Director has stated in what way he believes the medical evidence supports rebuttal.

JUDGE BUTLER: All right. Does the Director have an opening statement to make at this time?

MR. MALECKI: Your Honor, I believe that -- well, I will only state that I think rebuttal is established under the evidence so far before the record by the report of Doctor Nestmann under subsection (b)(2). However, since we are expecting more medical evidence, I am not going to argue fully at this time since there may be a change --

(Pause.)

JUDGE BUTLER: All right.

MS. ANDERSON: Could I ask for a clarification on the record? I'm sorry. This isn't exactly in order.

JUDGE BUTLER: Yes.

MS. ANDERSON: I was sort of surprised this morning causation was not in issue and total disability is, only.

MR. MALECKI: Well, that it what is checked on the controversion sheet.

MS. ANDERSON: Okay.

MR. MALECKI: I could raise it but I don't think I am going to.

MS. ANDERSON: Okay.

(Pause.)

JUDGE BUTLER: Well, then we are agreed we are proceeding solely on the issue of total disability?

MR. MALECKI: Yes, Your Honor.

JUDGE BUTLER: All right. Then call your witness please.

MS. ANDERSON: Your Honor, I would like to call the Claimant, Mr. Jack Robinett.

Whereupon,

JACK ROBINETT

having been first duly sworn, was called as a witness herein and was examined and testified, as follows:

JUDGE BUTLER: Proceed.

MS. ANDERSON: Thank you, Your Honor.

(Pause.)

ROBINETT - DIRECT

DIRECT EXAMINATION

BY MS. ANDERSON:

...

(THE TESTIMONY OF JACK ROBINETTE IS OMITTED FROM THIS APPENDIX.)

...

JUDGE BUTLER: All right. You can step down if you wish, Mr. Robinett.

THE WITNESS: Yes, thank you, sir.

(The witness stood aside.)

JUDGE BUTLER: Does the Director have any evidence?

MR. MALECKI: Your Honor, we have no witnesses or further evidence at this time.

JUDGE BUTLER: All right. Does Claimant have anything by way of summation at this time?

MS. ANDERSON: I would just like to make a couple of comments with regard to Doctor's Nestmann's report about which the Director has indicated as the record now stands would support rebuttal. I have a couple of problems with that and I would like to point them out.

JUDGE BUTLER: Where does that appear in the record?

MS. ANDERSON: That is Director's Exhibit 44.

JUDGE BUTLER: 44?

MS. ANDERSON: Yes, sir.

JUDGE BUTLER: All right.

MS. ANDERSON: In that the Director does not contest causation. I assume they believe that Doctor Nestmann's report supports a conclusion of no total disability. Certainly he talks about a lot of medical problems. The only conclusion as to degree of disability he really states is that this man submits evidence of pulmonary studies that are within satisfactory limits. The chest x-ray shows minimal degree of impairment. I believe this man has pneumoconiosis. I believe that his impairment is not severe enough to interfere with returning to his

usual physical activities inside the mine if he were inclined to do so.

There are a couple of problems with this. Firstly, it is not clear whether his statement as to impairment refers only to the impairment that was diagnosed by x-ray. If that is the case, and it is not clear as I say which creates problems with the report itself, it certainly would not fulfill the requirement of Bethlehem Mines v. Massey, where the Court rejected the Benefits Review Board approach that rebuttal would be fulfilled under (b)(3) by showing that the pneumoconiosis is not alone totally disabling.

In that case they said where the combined effects of several diseases disable the miner the opposing party must establish that the miner's primary condition was not aggravated to the point

of total disability by prolonged exposure to coal dust. Certainly it wouldn't fulfill the requirement of contribution. It certainly wouldn't fulfill the requirement of aggravation.

Furthermore, it is not even certain what he is referring to when he says he could go back to his usual physical activities in that he related the employment of Mr. Robinett as being running a continuous miner. As Mr. Robinett's testimony established, running the continuous miner was not the extent of his physical requirements of his job. The other duties, the moving the cable and the duties that he would be assigned when the continuous miner was down, certainly required more exertion than running a continuous miner.

Therefore, I would suggest that Doctor Nestmann's conclusions could not fulfill rebuttal.

JUDGE BUTLER: Any response to that?

MR. MALECKI: Sure, Your Honor. I would like to respond. In this particular case I think that rebuttal is established under (b)(2). The doctor basically has found that he is able to do his usual physical activities inside the mine. And, I don't believe that one can assume that the doctor thinks that just because the doctor's category is a continuous miner operator, which in fact is his category, that the doctor believes that he has a sedentary job. And, that I think is the interpretation that my colleague here would put on Doctor Nestmann's report, and I don't think that that is a reasonable interpretation of that report.

I believe that Doctor Nestmann's report is based on a broad group of objective tests and is a well reasoned report and that it fills the requirements of Lyons versus Amax Coal. I don't think it can be implied that he would have assumed the absence of any type of exertion. I have nothing further.

JUDGE BUTLER: All right.

MS. ANDERSON: I have one more comment.

JUDGE BUTLER: Proceed.

MS. ANDERSON: Just quickly, he did not label him a continuous miner operator. He said he was running a continuous miner. But additionally I would like to note that this is not the only medical evidence in the file. There is Doctor Tan's (phonetic) conclusion that was a report that was made at the same time that lists

severe limitations on the miner's activities that may be due to pulmonary impairments.

Therefore, Doctor Nestmann's report would have to be weighed against that, in any case. But I would like to point out that it is the Director's burden to submit clear evidence, and whether it might not be that Doctor Nestmann -- maybe he was considering all the possible duties of a continuous miner operator, but I believe that would be the burden of the Director to show on the record.

JUDGE BUTLER: Does the Director have anything further?

MR. MALECKI: I have nothing further to add to my previous comments.

JUDGE BUTLER: All right. Then the record for decision will be closed with the exception heretofore noted. And, the

record should indicate the acceptance of the Claimant's prehearing report which I will retain in the file. With that, the hearing this morning is concluded. Thank you very much.

MR. MALECKI: Thank you, Your Honor.

MS. ANDERSON: Thank you.

JUDGE BUTLER: This hearing is concluded.

(Whereupon, at 9:55 a.m., the hearing in the above-entitled matter was closed.)

APPENDIX B

APPENDIX B IS THE BRIEF WHICH JACK ROBINETTE FILED IN THE FOURTH CIRCUIT AS THE PETITIONER. THE BRIEF IS REPRODUCED IN ITS ENTIRETY EXCEPT FOR SUBPART B OF PART V, ARGUMENT, WHICH HAS BEEN OMITTED BECAUSE IT IS IRRELEVANT FOR THE PURPOSE OF THIS APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 88-1144

JACK ROBINETTE,

Petitioner,

v.

DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

BRIEF OF PETITIONER

ON APPEAL FROM THE BENEFITS REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR

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I.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to section 21(c) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 921(c), as incorporated by section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a). The injury at issue arose in the State of West Virginia.

II

STATEMENT OF CASE

On March 23, 1973, Jack Robinette filed an application for disability income benefits under the Federal Coal Mine Health and Safety Act of 1969 as amended. (App. 103) The application was denied and Jack Robinette requested a hearing before

an Administrative Law Judge. The Deputy Commissioner dismissed the coal mine operator and transferred potential liability to the Black Lung Disability Trust Fund. (App. 243)

A hearing was held before Administrative Law Judge, James J. Butler, on July 10, 1985 in Charleston, West Virginia. At hearing, Counsel for the Director, Office of Workers' Compensation Programs stipulated that Jack Robinette had worked 30 years in coal mine employment, had pneumoconiosis, and that pneumoconiosis was a causal factor in his disability.

The only issue contested by the Director was whether or not Jack Robinette was totally disabled as defined by the Act. (App. 37, 40, 41, 245) The record was held open for 65 days for post hearing

development of evidence. (App. 38, 76, 90)

On December 24, 1985, the Administrative Law Judge issued a Decision and Order. (App. 4) The Administrative Law Judge found that Jack Robinette had been employed in coal mining for 30 years and that he had pneumoconiosis as established by the x-ray evidence. The Administrative Law Judge stated the only issue was whether Jack Robinette was totally disabled.

Because Jack Robinette had pneumoconiosis and more than 10 years of coal mine employment, the Administrative Law Judge invoked the interim presumption pursuant to 20 C.F.R. 727.203(a)(1). The invocation gave Jack Robinette the benefit of the presumption that he was totally disabled from performing his former coal

mine employment due in whole or in part from pneumoconiosis arising out of his coal mine employment.

The Administrative Law Judge then ruled that the presumption was rebutted pursuant to 20 C.F.R. 727.203(b)(2) (hereinafter (b)(2) rebuttal) because the preponderance of the evidence established that Jack Robinette was not totally disabled from performing his former coal mine employment. The application for disability benefits was denied.

Jack Robinette filed a Notice of Appeal to the Benefits Review Board. No cross appeal was filed by the Director.

The Board reversed the Administrative Law Judge's finding that (b)(2) rebuttal was established, citing Sykes v. Director, OWCP, 812 F.2d 890, 10 BLR (4th Cir. 1985). The Director has not challenged

the Board's reversal of the Administrative Law Judge's finding that (b)(2) rebuttal was not established.

The Board then reversed, sua sponte, the Administrative Law Judge's finding that rebuttal under Section 727.203(b)(3) (hereinafter (b)(3) rebuttal) was not established. Rebuttal under (b)(3) requires that a preponderance of the evidence establish that the miner's impairment does not arise even in part from pneumoconiosis. The Board reversed the finding that (b)(3) rebuttal was not established even though the Director had not raised the issue on appeal and even though the Director had stipulated at the hearing that (b)(3) rebuttal was not established. (App. 37, 40, 41)

Having found that Jack Robinette was not entitled to disability benefits under

the Part 727 of the regulations, the Board remanded the case for consideration of entitlement under 20 C.F.R. Section 410.490. The Board cited Broyles v. Director, OWCP, 824 F.2d 327, 10 BLR 2-194 (4th Cir., 1987), later affirmed in Pittston Coal Group v. Stebben, 109 S.Ct. 414, 102 L.Ed. 408 (1988) as requiring all Part 727 cases had to be reviewed under Section 410.490.

On November 19, 1987, the Director moved the Board to reconsider its order of remand. (App. 28) The Board issued a new order on June 23, 1988 withdrawing the order to remand and affirming the denial of disability benefits. (App. 30) The Board, cited their decision in Whitman v. Boyle Land and Fuel Co., en banc, 11 BLR 1-99 (1988), holding that Section 410.490 was inapplicable to Part C claims. In

Whitman the Board held that applying Section 410.490 to Part C claims would be a violation of the rule-making procedures of the Administrative Procedures Act, 5 U.S.C. Section 553(b)(c).

On August 26, 1988, Jack Robinette timely filed a Petition to Review before this Honorable Court.

III

FACTS

The petitioner, Jack Robinette, is 60 years old and has an 8th grade education. (App. 103) He began work as a coal miner at age 19 and continued to work as a coal miner for 30 years until February 16, 1979 when he became totally disabled. (App. 37, 49, 57, 111-115) Jack Robinette testified that he had difficulty performing his work even before he left the mines. (App. 59-51) His last

employer, The Youngstown Mines Corporation, wrote a letter to the U.S. Department of Labor stating that at the time Jack Robinette quit coal mining in February 1979 he was too disabled to work. (App. 115)

It is undisputed that Jack Robinette has pneumoconiosis. At hearing, counsel for the Director stipulated that Jack Robinette had pneumoconiosis. (App. 37, 245) At hearing, the Director also conceded that pneumoconiosis played a causal role in Jack Robinette's disability. The Director conceded that the only issue in the case was whether Jack Robinette was totally disabled as defined by the Act. (App. 37, 40, 41)

IV

ISSUES

A. DID THE BENEFITS REVIEW BOARD ERR IN REVERSING THE FINDING OF THE ADMINISTRATIVE LAW JUDGE THAT SUBSECTION 727.203(b)(3) REBUTTAL WAS NOT ESTABLISHED WHEN THE PARTIES HAD STIPULATED THAT (b)(3) REBUTTAL WAS NOT ESTABLISHED AND THE ISSUE WAS NOT RAISED ON APPEAL?

B. DID THE BENEFITS REVIEW BOARD ERR IN FINDING THAT 20 C.F.R. SECTION 410.490 DID NOT APPLY TO THIS APPLICATION FOR DISABILITY BENEFITS FILED IN 1973?

V

ARGUMENT

A. IF ALL OPPOSING PARTIES STIPULATE TO A FACT OR ISSUE, THE CLAIMANT IS RELIEVED OF THE BURDEN OF PROVING IT

The Benefits Review Board reversed the finding of the Administrative Law Judge that rebuttal pursuant to Subsection

727.203(b)(3) was not established. In so doing, the Board overlooked the fact that counsel for the Director had conceded at the hearing that (b)(3) rebuttal was not established.

Of course, the reason the stipulation was not pointed out to the Board is because (b)(3) rebuttal was not an issue before the Board. The Board's reversal of the Administrative Law Judge's decision on (b)(3) rebuttal was sua sponte.

At hearing, counsel for the Director twice stated on the record that the only issue was the question of total disability. (App. 37 and 41) Director's counsel also stated that he was not raising any issue as to causality. (App. 41) He also stipulated that Jack Robinette had pneumoconiosis and that he

had worked in coal mining for 30 years. (App. 37, 245)

By stipulating to the existence of pneumoconiosis and 30 years of coal mine employment, the Director effectively stipulated to the invocation of the interim presumption pursuant to subsection 727.203(a)(1), which presumes total disability in whole or in part due to pneumoconiosis. The presumption under (a)(1) is invoked if the miner has pneumoconiosis and worked in coal mine employment more than 10 years.

Similarly, the Director also in effect stipulated that the only issue of the claim was rebuttal pursuant to subsection 727.203(b)(2). Rebuttal under (b)(2) is established if the preponderance of the evidence shows that the miner is able to do his former coal mine work. A

miner unable to perform his former coal mine work or comparable work is considered totally disabled under the regulations. 20 C.F.R. Sections 718.204(b) and 725.101(a)(21). When the Director stipulated that the only issue was total disability, he stipulated that he could establish none of the four rebuttals provided at Section 727.203(b) except (b)(2) rebuttal.

One of the rebuttal provisions at Section 727.203(b) is (b)(3) rebuttal. Not only did the Director stipulate that (b)(2) rebuttal was the only issue, he specially stipulated that causality or (b)(3) rebuttal was not an issue.

By stipulating that causality was not to be an issue, the Director in effect stipulated that (b)(3) rebuttal could not be established. The causality issue turns

on whether or not the miner's impairments are related in whole or in part to his coal mine employment. Rebuttal under (b)(3) is established if a preponderance of the evidence shows that the miner's disability did not arise in whole or in part out of his coal mine employment.

The record was held open for 52 days after the hearing for the Director to submit evidence. (App. 39, 77, 99) Jack Robinette was granted the option to respond to the Director's late submission. (App. 39) Had (b)(3) rebuttal been at issue, he would have had the opportunity to seek additional medical evidence on that issue.

At hearing Jack Robinette's counsel was concerned whether (b)(3) rebuttal was an issue and asked for clarification on the record. (App. 40-41) Had she known

that (b)(3) rebuttal was an issue, she would have had the opportunity to submit more evidence on this issue. The opportunity to know what issues are in litigation is basic to the fairness of the judicial process.

Because the Director stipulated that Jack Robinette's impairment was related to his coal mine employment, Mr. Robinette was relieved of any burden of submitting evidence on this issue. The Benefits Review Board has held that if the opposing party stipulates to a fact or issue at the hearing, then the claimant is relieved of any burden of proving it. Cooley v. Alabama By Products Corporation, 5 BLR 819 (1983), footnote 4 at 5 BLR 819; and Backert v. Director, 6 BLR 1-640 (1983).

The Board has also held that if a party concedes an issue at the hearing, it

cannot later raise the issue on appeal to the Board. Mitchellto v. Peabody Coal Company, 4 BLR 1-164 (1981); and Taylor v. 3D Corporation, 3 BLR 1-350 (1981). The Director did not raise the issue on appeal, but it would seem that the Board should not sua sponte raise issues on appeal that the parties are prohibited from raising.

This case should be reversed and remanded for the payment of benefits. The interim presumption that Jack Robinette is totally disabled in whole or in part due to pneumoconiosis has not been rebutted. The Board's finding that (b)(2) rebuttal was not established has not been challenged. The Board erred in reversing the Administrative Law Judge's finding as to (b)(3) rebuttal. The Administrative

Law Judge's finding that (b)(3) rebuttal was not established should be affirmed.

A remand for the development of further evidence would be unfair. Jack Robinette applied for benefits 16 years ago. The slowness of the judicial process might be unavoidable, but it is an injustice. The federal black lung program is infamous for awarding benefits to miners after they have died. This case should be remanded for payment of benefits.

B. THE BENEFITS REVIEW BOARD ERRED IN FINDING THAT 20 C.F.R. SECTION 410.490 IS INAPPLICABLE TO THIS CASE

(SUBPART B IS OMITTED BECAUSE IT IS IRRELEVANT FOR PURPOSES OF THIS APPENDIX.)

VI

CONCLUSION

Jack Robinette's entitlement to disability income benefits under the Act is established under 2 independent sections of the regulations. He has established his claim under both Section 727.203 and Section 410.490. Establishment of his claim under either one of these sections would entitle him to disability benefits. Jack Robinette has established his claim under both. This case should be remanded for payment of benefits to the disabled coal miner.

Respectfully submitted,

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APPENDIX C

APPENDIX C IS THE REPLY BRIEF WHICH JACK ROBINETTE FILED IN THE FOURTH CIRCUIT AS THE PETITIONER. THE BRIEF IS REPRODUCED IN ITS ENTIRETY EXCEPT FOR PARTS D AND E, WHICH HAVE BEEN OMITTED BECAUSE THEY ARE IRRELEVANT TO THE PURPOSE OF THIS APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 88-1144

JACK ROBINETTE,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITIONER'S REPLY BRIEF

ON APPEAL FROM THE BENEFITS REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR

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REPLY ARGUMENT

The petitioner's contentions on appeal are set forth in his opening brief. The petitioner here seeks to reply to the points raised by the Director in his brief.

A. THE DIRECTOR'S STIPULATION THAT PNEUMOCONIOSIS WAS A CAUSAL FACTOR IN JACK ROBINETTE'S DISABILITY WAS NOT PREJUDICED AFTER THE HEARING BY THE FOURTH CIRCUIT'S DECISION IN SYKES V. DIRECTOR

The petitioner, Jack Robinette, contends that the Benefits Review Board improperly denied his application for benefits by finding that pneumoconiosis was not a causal factor in his total disability. Based on this finding, the Board found that the Director had established rebuttal pursuant to Section 727.203(b)(3), hereinafter referred to as

(b)(3) rebuttal. Jack Robinette contends that he did not have to prove that pneumoconiosis is a causal factor in his disability because the Director stipulated that fact. If one party stipulates a fact, the opposing party is relieved of the burden of proving it.

On the list of contested issues which the Deputy Commissioner filed, the Director did not contest issue number nine, that "[t]he miner's disability or death is (was) due to pneumoconiosis." (App. 246) It is on this document that the Director states which of the issues necessary to entitlement he is going to contest. The preparation of medical evidence in a federal black lung case is time consuming and expensive. The Benefits Review Board has held that the claimant is entitled to rely on the list

of contested issues and is relieved of the burden of proving any fact which the Director does not contest on the list of contested issues. See Thornton v. Director, 8 BLR 1-277 (1988), in which the claimant was relieved of the burden of proving pneumoconiosis.

The Benefits Review Board held in Thornton that the Director could not amend the list of contested issues immediately prior to the hearing. In Jack Robinette's case, the Director never sought to amend the list of contested issues. At hearing, the Director stated that causality was not an issue and that the only issue was total disability. (App. 37 and 41)

Jack Robinette submitted no evidence. (App. 37) He relied on the evidence developed by the Deputy Commissioner and the Director. He was entitled to rely on

the Director's stipulation that causality was not an issue. Had Jack Robinette known causality was an issue, he would have had an opportunity both before and after hearing to develop evidence on the issue. (App. 37-39) Since causality was not an issue, he did not do so.

When Jack Robinette appealed the Administrative Law Judge's finding of (b)(2) rebuttal, the Benefits Review Board failed to note that the Director had conceded that Robinette's disability was due to pneumoconiosis and sua sponte found that Robinette's pneumoconiosis played no role in his disability and that (b)(3) rebuttal was, therefore, established.

In his response brief, the Director argues that he should not be held to his stipulation because he has been prejudiced by a change of law in the Fourth Circuit

which occurred after hearing. The case the Director refers to is Sykes v. Director, OWCP, 812 F.2d 890, 10 BLR (4th Circuit 1987).

The Court in Sykes v. Director, OWCP, held that evidence showing a miner has no respiratory impairment does not establish rebuttal pursuant to Section 727.203(b)(2). The Court held that (b)(2) rebuttal could be established only by a showing that the miner was not totally disabled based on all his disabilities.

The Court also held that a finding that the miner had no respiratory impairment would establish (b)(3) rebuttal but not (b)(2) rebuttal. To establish (b)(3) rebuttal, the Director must establish that pneumoconiosis is not a causal factor in the miner's total disability. See Bethlehem Mines

Corporation v. Massey, 736 F.2d 120 (4th Circuit 1984). If the miner has no respiratory impairment, then pneumoconiosis is not a causal factor in his disability.

The Director contends, after Sykes v. Director, OWCP, that evidence showing the miner is not totally disabled from a respiratory standpoint is sufficient to establish (b)(3) rebuttal. This contention is wrong. Even though a miner is not totally disabled from a respiratory standpoint, (b)(3) rebuttal is not established by that evidence. If a respiratory impairment caused by pneumoconiosis is partially responsible for the miner's total disability, he is entitled to black lung benefits. For the Director to establish (b)(3) rebuttal, he must rule out that a miner's total

disability arises in whole or in part from pneumoconiosis. See Bethlehem Mines v. Massey, supra. Sykes v. Director, OWCP did not change the standard for (b)(3) rebuttal, which is the standard present in this action.

If the Director establishes that the miner has no respiratory impairment, this would rule out pneumoconiosis as a causal factor in the miner's disability and establish (b)(3) rebuttal. Establishing that the miner is not totally disabled due to a respiratory impairment does not rule out that pneumoconiosis plays a partial cause of the miner's disability and does not establish (b)(3) rebuttal.

When the Director conceded that the miner's disability was caused by pneumoconiosis, he conceded that (b)(3) rebuttal was not established. Nothing in

Sykes v. Director, OWCP prejudices the Director's concession. The stipulation is unaffected by the change of law the Director now seeks to rely on as unfairly prejudicing the Director's stipulation.

Before Sykes v. Director, OWCP, the Director argues he could establish total disability or (b)(2) rebuttal, by showing that the miner was not totally disabled due to a respiratory impairment. This was the Benefits Review Board's holding in Sykes v Itman Coal Company, 2 BRB 1-1089 (1980) which is cited by the Director. This is true, and when Sykes v. Director, OWCP was decided by the Fourth Circuit, it established a standard which followed the plain meaning of the regulations. It was, however, a tougher standard for the Director to meet to establish (b)(2) rebuttal.

Sykes v. Director, OWCP made it tougher for the Director to establish total disability and (b)(2) rebuttal, but it did not prejudice the Director's stipulation. The Director's stipulation was that causation and (b)(3) rebuttal were conceded. The Director was still free to establish (b)(2) rebuttal, but he failed to do so.

It is impossible to see how the Director's stipulation that pneumoconiosis was a causal factor in Jack Robinette's impairment was prejudiced by the change of law announced in the Sykes v. Director, OWCP case. Prior to the Sykes v. Director, OWCP decision, the Director could rebut the presumption pursuant to (b)(2) rebuttal by showing that the miner was not totally disabled. After Sykes v. Director, OWCP, the Director could still

rebut the presumption by (b)(2) rebuttal with a showing that the miner was not totally disabled. The Director stipulated the only issue was total disability. Had he proved that the miner was not totally disabled, the Director would have established (b)(2) rebuttal.

The Benefits Review Board found the evidence insufficient to prove that the miner was not totally disabled. The Board held, therefore, that (b)(2) rebuttal was not established. Importantly, the Director has not challenged that finding.

The Director's stipulation that causation was not an issue was not prejudiced by the Fourth Circuit's decision in Sykes v. Director, OWCP. The Director should be held to his stipulation given many times on the record.

B. IT WAS IMPROPER AND PREJUDICIAL TO JACK ROBINETTE FOR THE BENEFITS REVIEW BOARD TO MAKE A FINDING CONTRARY TO WHAT THE PARTIES HAD STIPULATED WAS TRUE.

The Director argues that the Benefits Review Board should sua sponte raise new issues on appeal if it is necessary to reach a proper result. This is true as a general principle, and it is particularly true when there has been a material intervening change of law.

For the intervening change to be material, however, it must have some prejudicial effect on one of the parties. It has already been pointed out that the intervening change of law cited by the Director did not prejudice the position the Director took at the hearing.

Although it may be proper for the Benefits Review Board, in certain circumstances, to sua sponte raise new

issues, it is not proper for the Board to change facts stipulated by adversarial parties.

The Director conceded that pneumoconiosis was a significant causal factor in Jack Robinette's total impairment. Jack Robinette was entitled to rely on that stipulation. After Jack Robinette failed to introduce any evidence as to causation, despite having full opportunity to do so, it is patently unfair for the Benefits Review Board to sua sponte reverse the Director's stipulation.

At hearing, the Director stated on the record, "The only issue at hand is the question of total disability." (App. 37) Causation was not noted as an issue which the Director would contest on the prehearing controversion sheet which is

designed to narrow issues for hearing. (App. 246) Counsel for Jack Robinette stated that she was "surprised" that "causation" was not an issue. Counsel for the Director replied, "I could raise it (causation) but I don't think I'm going to." (App. 41) In response to the Administrative Law Judge's statement, "Well, then we are all agreed we are proceeding solely on the issue of total disability", whereupon counsel for the Director replied, "Yes, Your Honor." (App. 41)

The Director stated four times on the record that causation was not an issue, and Jack Robinette was entitled to rely on that stipulation.

Importantly, the Director cites no case, where any appellant body has sua sponte overturned a stipulation of fact

agreed to by the parties in an adversarial proceeding.

C. THE FINDING OF THE ADMINISTRATIVE LAW JUDGE THAT (b)(3) REBUTTAL WAS NOT ESTABLISHED IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The Director argues in his brief that "Robinette has not challenged the factual sufficiency of the evidence to establish (b)(3) rebuttal." Of course, Jack Robinette relies on the sufficiency of the Director's initial stipulation to satisfy that factual point.

Assuming arguendo, that the Director had not so stipulated, the evidence in the record supports the Administrative Law Judge's finding that (b)(3) rebuttal was not established.

The Administrative Law Judge invoked the interim presumption because all x-rays were positive for pneumoconiosis. By

operation of law, it is, therefore, presumed that Jack Robinette's disability is due to pneumoconiosis. This is a rebuttable presumption, and the Director has the burden to disprove it.

To establish rebuttal pursuant to Subsection 727.203(b)(3), the Director must rule out pneumoconiosis as a causal factor in the miner's impairment. Even if pneumoconiosis would not in and of itself prevent the miner from returning to his former coal mine work, (b)(3) rebuttal is still not established if the miner's impairment is partially caused by pneumoconiosis. Bethlehem Mines Corporation v. Massey, supra.

Here, the Administrative Law Judge found only Dr. Patham Thavaradhara had discussed whether or not pneumoconiosis could be ruled out as a causal factor of

Jack Robinette's impairment. The Administrative Law Judge gave Dr. Thavaradhara's report little weight for two reasons.

First, the report was inconsistent as to whether or not Jack Robinette had pneumoconiosis. Dr. Thavaradhara referred Jack Robinette to a board certified radiologist, Dr. Al-Asbahi, who read the chest x-ray as positive for pneumoconiosis 1/1. (App. 77, 78) Without explanation, Dr. Thavaradhara states that his evaluation shows no evidence of pneumoconiosis by chest x-ray. (App. 91) Second, the Administrative Law Judge found that Dr. Thavaradhara was tentative in stating that he through heart disease caused Jack Robinette's impairment. Dr. Thavaradhara stated, "I believe he is disabled <u>mainly</u> due to his heart

condition. I would advice (sic) to get opinion from his heart physician." Emphasis added (App. 100) This statement does not rule out pneumoconiosis as playing some role. Also, it is an expression of uncertainty on the part of the Doctor, who advises that other experts be consulted. (App. 100) This is not good rebuttal evidence.

Substantial evidence supports the Administrative Law Judge's conclusion that only Dr. Thavaradhara's report goes to the issue of whether or not Jack Robinette's pneumoconiosis can be ruled out as a causal factor in his impairment. The Judge's reasons for discounting Dr. Thavaradhara's inconsistent opinion are rational.

Dr. Nesterman stated that Jack Robinette had pneumoconiosis but that his

impairment was not severe enough to prevent him from returning to his coal mine work. (App. 252A) The Administrative Law Judge was correct in finding that Dr. Nesterman's report did not go to the issue of (b)(3) rebuttal. The issue in (b)(3) rebuttal is not whether the miner's pneumoconiosis alone will prevent him from returning to his coal mine work, but rather whether pneumoconiosis can be ruled out as a causal factor in the miner's impairment. Bethlehem Mines Corporation v. Massey, Ibid.

Dr. Tans' report did not discuss whether Jack Robinette had pneumoconiosis or whether it was a causal factor in his impairment. (App. 149-156, 210-213) The medical records of Jack Robinette's heart surgery and treatment for heart disease do

not discuss Jack Robinette's pneumoconiosis or whether he has impairments other than heart disease.

The Director failed to establish (b)(3) rebuttal with evidence sufficient to overcome the presumption that pneumoconiosis was a causal factor in Jack Robinette's disability. Accordingly, the Administrative Law Judge's finding that (b)(3) rebuttal was established should be affirmed, as supported by substantial evidence, even if it is assumed that the Director had not stipulated that Jack Robinette's disability was due to pneumoconiosis.

The sua sponte finding of the Benefits Review Board that pneumoconiosis was not a causal factor in Jack Robinette's total disability should be reversed. It was improperly assumed by

the Board that causation was at issue when it had been stipulated out of the contested issues to be decided. In any event, the Administrative Law Judge's finding that the evidence did not rebut the causation presumption is rational and supported by substantial evidence and should be upheld.

This case should not be remanded so that the Director can withdraw his stipulation and the case be relitigated for two reasons.

First and most importantly, Jack Robinette applied for disability income benefits under the Act in 1973. He has waited sixteen years for a final decision on this case. The federal black lung program is notorious for its long delays, with a final award of benefits on the miner's claim occurring, more than

occasionally, after the miner has died.

Second, the Administrative Law Judge's decision that the evidence did not support (b)(3) rebuttal is supported by substantial evidence. The Judge's decision was based both on the evidence and the Director's stipulation that the only issue was total disability.

This case should be remanded to the Department of Labor for the payment of benefits.

PARTS D AND E HAVE BEEN OMITTED
BECAUSE THEY ARE IRRELEVANT TO
THE PURPOSE OF THIS APPENDIX

CONCLUSION

Jack Robinette's entitlement to benefits is established on two grounds. He invoked the presumption that he is totally disabled due to pneumoconiosis under both Section 727.203 of the Department of Labor's regulation and

Section 410.490- of Social Security's regulations. In neither case has the Director, OWCP met his burden of established rebuttal.

This case should be remanded for the payment of benefits to the Deputy Commissioner of the Division of Coal Mine Workers' Compensation, United States Department of Labor.

Respectfully submitted,

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